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Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARMALEE GOONEWARDENE, an individual,

Plaintiff and Appellant,

vs.

ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC,
Defendants and Respondents.

On Review of a Decision of the California Court of Appeal,
Second Appellate District, Division Four, No. B267010

On Appeal from the Superior Court of California,
County of Los Angeles
The Hon. William Barry, Judge
Civil Case No. TC026406

PETITION FOR REVIEW

Robert A. Lewis* (SBN 83630)
Thomas M. Peterson (SBN 96011)
Zachary S. Hill (SBN 275886)
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone No.: (415) 442-1000
Facsimile No.: (415) 442-1001

Attorneys for Defendants, Respondents and Petitioners
ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

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Telephone No.: (415) 442-1000
Facsimile No.: (415) 442-1001

Attorneys for Defendants, Respondents and Petitioners
ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, Defendants, Respondents and Petitioners ADP, LLC and ADP Payroll Services, Inc. hereby notifies the Court that ADP, LLC and ADP Payroll Services, Inc. are 100% owned by Automatic Data Processing, Inc. No other publicly-held company owns stock in ADP, LLC or ADP Payroll Services, Inc.

Dated: December 14, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: _____

Robert A. Lewis
Attorneys for Defendants, Respondents and Petitioners ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

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I. STATEMENT OF ISSUES

For more than 60 years, individuals and businesses have assisted California employers with their non-delegable obligation to properly pay their employees. Petitioner ADP, LLC ("ADP") is one of the many businesses that provide payroll services to thousands of California employers. Until the court of appeal decision here, an employee's recourse for challenging an allegedly improper wage payment—whether or not a third-party payroll service provider was involved—was well-established, functioned effectively and involved only the employer who owed the wages. The employee made a wage claim against his or her employer pursuant to the Labor Code provisions the legislature established to ensure employees are paid properly and promptly. If the employee was wrong, the claim ended there. If the employee was right, the employer paid the wages it owed. Separately from resolution of the employee's wage claim, the contract between the employer and its payroll service provider determined what recourse might be available to the employer if a payroll service provider's error contributed to an improper wage payment.

Over the years, some employees tried to enmesh payroll service providers into this long-established statutory resolution process, generally on arguments that payroll service providers are employers or co-employers of their clients' employees. Indeed, plaintiff Goonewardene here attempted to do exactly that. But California courts uniformly have rejected such efforts, as the court of appeal did here in affirming the trial court's rejection of Plaintiff's claims under the

Labor Code. Opinion ("Op.")-12-20.

But while affirming the law that payroll service providers cannot be liable under the Labor Code for the improper payment of wages, the court of appeal inexplicably invented new law that would allow employees to bring wage claims against payroll service providers through the back door. In holding that employees are third-party beneficiaries of the contracts between employers and payroll service providers—and for that reason may also pursue tort claims for professional negligence and negligent misrepresentation against payroll service providers—the court of appeal disrupts the law that efficiently has resolved employee wage disputes for decades. It is no exaggeration to say that the court of appeal's decision will mean that payroll service providers now routinely will become defendants in existing and future wage and hour lawsuits simply because they assisted employers in discharging their non-delegable duties to pay wages.

It is also no exaggeration to say that this extraordinary change in California law will complicate and delay wage and hour lawsuits and increase the expenditure of time and expense by the parties and trial courts, with no compensating benefit for anyone. Wage and hour litigation is about whether an employee was properly paid, irrespective of the possible involvement of third-party payroll service providers. The court of appeal's newly-recognized causes of action are wholly redundant to the claims the Labor Code and the employment relationship make available to employees to ensure that employers properly pay the wages they promised to pay. Indeed, because the court of appeal recognized

two tort claims against payroll service providers that are not available to employees against their employers under the Labor Code, its decision perversely exposes payroll service providers, because of the differences between tort and contract damage measures, to potentially greater liability than the employers who promised the wages to their employees and benefitted from their work.

This Court therefore should review the following issues:

Issue One. Does California law and public policy, explicitly recognized in the trial court's order and ignored by the court of appeal, prohibit the blurring of responsibility between the employer and its third-party payroll service provider and place exclusively on the employer the obligation to pay employee wages, a bright line rule that recognizes that the employer's duty to pay wages is non-delegable?

Issue Two. Are employees third-party creditor beneficiaries of contracts by which their employers secure assistance in preparing wage payments and wage statements such that they may sue payroll service providers and hold them responsible in contract for compliance with Labor Code obligations that apply only to employers and are part of employers' non-delegable duties to provide their employees with legally-compliant wages and wage statements?

Issue Three. If employees are third-party beneficiaries of the contracts between employers and payroll service providers, do payroll service providers also owe a duty to their clients' employees that supports tort claims for professional negligence and negligent misrepresentation, despite this Court's decisions

restricting tort remedies that seek to either redress contract breaches or to recover purely economic losses like the wages claimed by the Plaintiff here?

Issue Four. If employees are not third-party beneficiaries of the contracts between employers and payroll service providers, do payroll service providers nevertheless owe a duty to their clients' employees that supports tort claims for professional negligence and negligent misrepresentation that would potentially expose payroll service providers to greater liability than the employers who promised the wages to their employees and benefitted from their work?

Review of these four issues is not only crucial to every individual and business that provides payroll services to California employers, but also, in light of the court of appeal's stated reasoning, crucial to any individual or business that provides any service to California employers that may be characterized as benefitting the employer's employees.

II. STATEMENT OF THE CASE[1]

A. Routine Employment Litigation Alleging Wage And Hour Claims Morphs Into A Suit Against The Employer's Payroll Service Provider

This case started out as a single-plaintiff, garden-variety wage and hour case. In April 2012, plaintiff-appellant Sharmalee Goonewardene sued her former

[1] Appellant's court of appeal appendix is cited "AA-__." Respondents' appendix is cited "RA-__." The court of appeal's November 4 opinion is cited "Op.-__" and the November 29 modification as "M-Op.-__."

employers, Altour,[2] alleging employment-related claims spanning seven years: failure to pay wages, wrongful termination, and racial discrimination. (1-AA-3)

The case turned atypical when, two years into the case and just months from the trial date, Goonewardene secured leave to add an additional defendant: Altour's third-party payroll processing vendor ADP. (1-AA-12, 23) The effort late in the litigation to add Altour's payroll service provider, if anything more than a tactic to delay the trial date, was particularly curious, since under no circumstances could the payroll service provider be involved in the claims for wrongful termination or racial discrimination. Goonewardene's fourth amended complaint ("4AC") named ADP as a defendant only on a single cause of action (the thirteenth) under California's Unfair Competition Law (UCL), Bus. & Prof. Code §17200, and not on the 4AC's employment-related causes of action. (RA-3)

ADP demurred. (1-AA-12) Initially, the court deferred ruling because Goonewardene sought leave to file a Fifth Amended Complaint ("5AC"). (*Id.* at 37, 66, ¶1) The 5AC added two more ADP-related entities as defendants: AD Processing, LLC (the name under which ADP does business in California) and ADP Payroll Services, Inc. (which was not Altour's payroll service provider and had nothing to do with the allegations in this case). (2-AA-76-77, ¶¶6-8) ADP opposed leave to amend. (1-AA-10)

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[2] Altour allegedly comprises two corporations (in New York and California) named Altour International, Inc. 2–AA–78-80, ¶¶14-32, 2-AA-89, ¶102.

B. The Trial Court Rejects Plaintiff's Attempt To Blur The Employers' Non-Delegable Duty To Pay Wages And Comply With Labor Code Requirements

Ruling on both ADP's demurrer to the 4AC and plaintiff's motion for leave to file her 5AC, the trial court sustained the demurrer. It struck and dismissed all allegations based on ADP's alleged status as Goonewardene's employer. (RA-66, ¶¶3-5(f)) Nevertheless, the trial court allowed Goonewardene to try to plead causes of action based on something other than the theory that ADP was Goonewardene's "employer." (*Id.*)

Goonewardene's 5AC, a veritable laundry list of California causes of action, alleged six new claims against the ADP-payroll-processing defendants:

1. professional negligence (13th cause of action);
2. negligent misrepresentation (14th cause of action);
3. violation of B&P Code §17200 based on alleged misrepresentation (15th cause of action);
4. violation of B&P Code §17500, false advertising (17th cause of action);
5. third-party beneficiary breach of contract (18th cause of action); and
6. aiding and abetting (19th cause of action).

(2-AA-97-103)

Demurrer to the 5AC was sustained without leave to amend in a thoughtful and highly-detailed order. (1-AA-33-34) The trial court summarized its analysis thus:

> The fundamental approach in the Court's rulings herein is that Plaintiff is asking the Court to blur the responsibility between the employer and its third party payroll processing vendor, and, based on the legal authorities the Court has reviewed, the Court believes that to do so would be contrary to public policy. The Court believes that the focus has to be exclusively on the *employer's* obligation to pay employees' wages, and that there needs to be a bright line obligation in that regard. As the case law has made clear, an employer's obligation to make sure its payroll checks are accurate and that its employees are properly paid their wages is "non-delegable."

1–AA–33:19-27 (emphasis original).[3]

While the form of judgment and order were being settled, Goonewardene sought reconsideration and filed a proposed Sixth Amended Complaint ("6AC"), which embellished some of the 5AC's allegations.[4] (1-AA-37). The trial court did not rule on the reconsideration motion. Judgment was entered on August 5, 2015. (1-AA-25)

C. The Court Of Appeal Follows California Law And Holds That Employees May Not Sue Payroll Service Providers For Wage And Hour-Related Labor Code Violations

On appeal, plaintiff did not defend the 5AC's sufficiency. Op.-6-7. Therefore, all claims in the 5AC were properly dismissed by the trial court. The court of appeal considered whether the proposed 6AC—and therefore just the new

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[3] The 5AC doubled down on the theory that Altour's payroll service provider was plaintiff's employer, alleging all of Goonewardene's employment-related claims against newly-added defendants AD Processing, LLC and ADP Payroll Services, Inc. (1-AA-84-97) Not surprisingly, the court sustained the demurrer to these causes of action on the same basis it sustained ADP's earlier demurrer. (1-AA-1-2)

[4] As it pertains to ADP, the 6AC adds new allegations (they appear in redline) in paragraphs 139-157, 160 and 162, 170-171 and 184-186.

material inserted beyond the 5AC's allegations—stated any cause of action such that leave to amend should have been allowed. Op.-7-8.

The 6AC alleged (unchanged from the 5AC) "claims against ADP for failure to make timely wage payments (Lab. Code, §§201, 201.3, 201.5, 202, 203, 205.5; second cause of action), failure to pay overtime compensation (Lab. Code, §1194; tenth cause of action), and failure to issue adequate earnings statements (Lab. Code, §226, eleventh cause of action)." Op.-13.

The court of appeal held that ADP could not be sued for these alleged Labor Code violations because ADP was not plaintiff's employer. The court found "persuasive" and "appl[ied]" the "analysis" of *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, which it quoted in part:

> "[W]e conclude that 'control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay, and not that a person or entity is physically involved in the preparation of an employee's paycheck. This is the only definition that makes sense. The task of preparing payroll, whether done by an internal division or department of an employer, or by an outside vendor of an employer, does not make [the preparer] an employer for purposes of liability for wages under the Labor Code wage statutes. The preparation of payroll is largely a ministerial task, albeit a complex task in today's marketplace. The employer, however, is the party who hires the employee and benefits from the employee's work, and thus it is the employer to whom liability should be affixed for any unpaid wages. The extension of personal liability to the agents of an employer is not reasonably derived from the language and purposes of the Labor Code wage statues."

Id. at 1432.[5]

D. The Court Of Appeal Creates New Law That Employees May Sue Their Employers' Payroll Service Providers As Third Party Beneficiaries Of The Contracts Under Which Payroll Service Providers Assist Employers And Under The Torts Of Professional Negligence and Negligent Misrepresentation

Reviewing a "prolix and poorly organized 6AC," Op.-9, fn.3, the court of appeal imposed on payroll service providers liability for violations of the same Labor Code duties that it found applicable only to employers and that do not support direct causes of actions against those who assist with payroll preparation. The court concluded that employees are third-party creditor beneficiaries of the contracts by which employers procure payroll assistance. Op.-23.

The court of appeal purported to apply the third party beneficiary contract rights framework set out in the FIRST RESTATEMENT OF CONTRACTS, dividing third party beneficiaries between creditor and donee beneficiaries. "A person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee." Op.-23. The court of appeal initially concluded: "when a business enters into a contract with a service provider clearly aimed at aiding the business in discharging its duty to supply information or benefits to certain individuals, those individuals constitute third party beneficiaries of the contract between the business and the service provider." Op.-25.

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[5] For similar reasons, the court held the ADP defendants could not be sued on federal statutory claims for failure to pay overtime compensation, Op.-19-20, employment discrimination, or wrongful termination. Op.-20-22.

The court then evaluated the 6AC and concluded that it alleged an unwritten contract under which "ADP provided payroll calculation, records maintenance, legal advice and a host of related services to Altour for the benefit of Altour and its employees in the general area of employee wages and benefits." Op.-26, quoting 6AC. The court downplayed Plaintiff's appellate argument that "ADP received only a record of Plaintiff's hours per day, generated by Plaintiff, and used that information to provide Plaintiff with a paycheck and earnings statement on a semi-monthly basis. ADP had no ability whatsoever to determine whether Plaintiff took or missed a meal or rest break, and calculated Plaintiff's pay on the assumption that Plaintiff never missed a break." (AOB–2) In the court of appeal's view, "the 6AC expressly attributed [to the ADP defendants] some of the alleged misconduct..." that allegedly caused Plaintiff not to be fully compensated and to receive deficient wage statements. Op.-2. This all meant to the court of appeal that "[t]he 6AC thus alleges that Altour employees such as appellant are, at a minimum, third party creditor beneficiaries of the unwritten agreement." Op.-26.[6]

Based largely on its determination that Plaintiff is an alleged third-party creditor of an unwritten payroll services contract entered into by Altour, the court

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[6] In a companion footnote, the court speculated that Altour employees might arguably be third-party donee beneficiaries because of allegations that ADP provided employees "a mechanism...to access information and track their earnings." Op.-26, fn.5. In the end, however, the court made no holding about donee beneficiary status. The court's speculation is baseless, since there was no "donated" aspect of the ADP-Altour contract.

concluded that ADP owed a duty of care to Plaintiff and other Altour employees to prepare legally-compliant paychecks and wage statements. The court confirmed its duty finding by applying the factors outlined in *Biakanja v. Irving* (1958) 49 Cal.2d 647, and later explicated in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 376. Op.-41-42. With a duty recognized, the court concluded that a cause of action for professional negligence was stated. Op.-41.

Turning to Plaintiff's alleged tort of negligent misrepresentation, the court reasoned that a cause of action was stated against ADP based, again, on the court's third-party beneficiary determination. Further, in the court's view, Plaintiff's allegations overcame the restriction that a negligent misrepresentation claim only lies against a professional service provider if the plaintiff was a "specifically intended beneficiary of the information supplied by the professional." Op.-31, *citing Murphy v. BDO Seidman* (2003) 113 Cal.App.4th 687, 694.[7]

E. The Modified Appellate Opinion

In response to ADP's rehearing petition, the court of appeal modified its opinion in two respects. First, it changed its holding about the legal conditions necessary for third-party creditor beneficiary status. Abandoning its broad holding that third-party beneficiary status for an employee exists pursuant to "a contract with a service provider clearly aimed at aiding the business in discharging its duty to supply information or benefits to certain individuals...," the court instead held:

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[7] The court affirmed judgment for ADP on Plaintiff's causes of action for false advertising, unfair competition, and aiding and abetting. Op.-45-56.

"when an employer enters into a contract with a service provider by which the provider is to take over the employer's payroll tasks, including the preparation of the payrolls themselves, the employees constitute third party creditor beneficiaries of the contract between the employer and the service provider."[8] M-Op.-1-2.

Second, the court added a footnote rejecting ADP's argument that the economic loss rule forecloses a professional negligence cause of action. Without questioning the general applicability of the rule, the court reasoned that plaintiff's status as a third party contract beneficiary bestowed on plaintiff a "special relationship" that brought her within an exception to the economic loss rule and its restrictions on negligence causes of action that seek only recovery for economic damages. M-Op.-2-3.[9]

III. REASONS TO GRANT REVIEW

A. Review Is Warranted To Address California's Established Law and Public Policy Recognizing The Employer's Non-delegable Duty To Pay The Wages It Promised Its Employees

The decision here marks the first time any court has held that someone other than the employer is responsible for paying the wages of its employees.

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[8] The 6AC alleges a role for ADP far less than "tak[ing] over" Altour's "payroll tasks." *See*, post, topic 111.B.

[9] The court also noted that ADP did not raise the economic loss rule until its rehearing petition. M-Op.-2. Appellant's court of appeal briefs suggested no reason to raise the rule sooner. Moreover, the court of appeal cannot create a new, heretofore unrecognized cause of action that conflicts with this Court's precedent on the basis that one party did not mention the precedent sooner. Moreover, the economic loss rule is a facet of why no cause of action for professional negligence should be recognized—an issue ADP fully briefed in the trial court and on appeal.

That holding conflicts with established California law and sound public policy. The Labor Code places solely on employers a non-delegable duty to pay their employees' wages.

The court of appeal decision conflicts with this Court's holding that "no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages." *Martinez v. Combs* (2010) 49 Cal.4th 35, 49. That holding confirms what, until this decision, had been self-evident—because an employer hires its employees and benefits from their work, it is solely responsible for paying them what it promised according to legal requirements. The holding in *Martinez* is relied upon by the court in *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, where the court granted summary judgment for a payroll service provider against claims brought by an employee.

The decision also conflicts with the holding in *Futrell,* 190 Cal.App.4th at 1419, where the court explicitly recognized why employers have the sole duty to pay their employees:

> The employer, however, is the party who hires the employee and benefits from the employee's work, and thus it is the employer to whom liability should be affixed for any unpaid wages. The extension of personal liability to the agents of an employer is not reasonably derived from the language and purposes of the Labor Code wage statues.

And the decision conflicts with the Labor Code framework that employers must follow and that provides remedies for employer non-compliance. Indeed, *Aleksick* specifically recognized "the public policy in favor of *requiring employers*

to comport with Labor Code wage statutes and promptly and fully pay their employees." 205 Cal.App.4th at 1180.

The non-delegable nature of employer duties is apparent as a matter of statutory interpretation. Labor Code duties repeatedly fall on the "employer" and no one else. Under Labor Code §226(a), "[e]very *employer shall*...at the time of each payment of wages, furnish each of his or her employees...an accurate itemized statement in writing showing...." When wages are disputed, "*the employer* shall pay, without condition...," subject to various rights. Labor Code §206. Pay period interval obligations apply to the "employer." Labor Code § 204(a) & (c); *see also* "employer" references in Labor Code §§ 201, 203 & 203.1. "Shall" is mandatory. Labor Code §15. And when liability under the Labor Code is to be extended beyond the "employer," courts evaluate whether a "joint employer" situation is presented, not whether someone other than an "employer" is responsible. *See, e.g., Martinez,* 49 Cal.4th at 49.

Recently, the legislature broadened Labor Code liabilities beyond "employers," but only to "an owner, director, officer or managing agent of the employer" who is a "natural person." Labor Code §558.1. ADP does not fit within any of these categories. The court of appeal's decision has effectively recognized third-party liabilities that are broader than those the legislature sanctioned.

Moreover, recognizing liability for wage payment on the part of payroll service providers would be redundant to the liability provided by the Labor Code,

confer no benefit on employees or employers, and be wasteful. The employee's long-established right to obtain his or her full wages from the employer remains unchanged even if the employee were permitted now to bring a redundant claim against the payroll service provider that assisted the employer. Because the employee is only entitled to his or her promised compensation, a new right of action against a second defendant only ensures that determining whether an employee has received his or her promised compensation will take more time and cost more. And ultimately, since the law is clear that it is the employer who is responsible for fully paying its employees, a payroll service provider will have an indemnity right back against the employer for any judgment against it for improper payment of wages. Therefore, the court of appeal's decision creates a redundant, circular and wasteful new claim that benefits no one.

Established California law and public policy preclude the new path on which the court of appeal would have employees, employers, payroll service providers and the California legal system embark. This Court should review the decision.

B. Review Is Warranted To Address Whether California Employees Can Be Third Party Beneficiaries Of Their Employers' Contracts For Assistance With Preparing Payroll

The decision below also marks the first time any court has held that a contract to assist an employer with payroll confers third-party beneficiary rights on the employer's workers.

The court of appeal's third-party beneficiary conclusion, resting on its

creditor beneficiary analysis, derives from its assertion that payroll service providers "discharge some form of legal duty owed to the beneficiary [the employee] by the promisee [the wage-owing employer]." Op.-23, *quoting Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d, 394, 400 (discharge of duty is test of creditor beneficiary). That conclusion is clearly wrong under established law. An employer's duties to comply with Labor Code wage preparation requirements may not be delegated by the employer. Consequently, a payroll service provider cannot "discharge" the employer's obligations. A contract between an employer and a payroll service provider cannot absolve the employer of its duty to properly pay wages to its employees according to legal requirements. If a payment is not made correctly, or not made at all, due to actions of the payroll service provider under the contract with the employer, the employer still has the duty to the employee to make good on the wages. The employer cannot avoid that responsibility by pointing to the payroll service provider.

By recognizing third party beneficiary rights, the court of appeal decision conflicts with the rule that employer Labor Code obligations are not delegable and also fails to honor the rule that the promisor in a third-party creditor beneficiary arrangement must be discharging the promisee's obligation to the beneficiary.[10]

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[10] This problem is not remedied by the court of appeal's change in its wording from "when a business enters into a contract with a service provider clearly aimed at aiding the business in discharging its duty to supply information or benefits to certain individuals, those individuals constitute third party beneficiaries of the

Third party beneficiary liabilities do not extend to employees and agents hired to assist in fulfilling employer/promisor obligations. While an employer's agents and employees may *aid* in discharging the employers' obligations, they do not *discharge* them. The employer retains at all times "a duty to pay wages," *Martinez*, 49 Cal.4th at 49, in a manner that complies with statutory requirements.

These factors differentiate this case from those where creditor beneficiary relationships have been recognized and used to establish third-party beneficiary contract rights. Creditor beneficiary cases in this Court involve situations where the promisor is to render *substitute performance* of the promissee's duty owed to a third party. *E.g.*, *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 244-245 (assignee of a lease assumes its obligations); *Calhoun v. Downs* (1931) 211 Cal. 766, 770-771 (agreement to assume obligation to pay brokerage commission). Stated different, full performance is to be rendered by the promisor to the third party beneficiary.

The allegations of plaintiff's 6AC are *not* that ADP discharges Altour's duties or renders substitute performance in place of Altour. The 6AC alleges that ADP provides "services" that assist Altour with wage payment and statements.

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contract between the business and the service provider" to "when an employer enters into a contract with a service provider by which the provider is to take over the employer's payroll tasks, including the preparation of the payrolls themselves, the employees constitute third party creditor beneficiaries of the contract between the employer and the service provider." Characterizing the service provider's work as "taking over" something from the employer does not mean the provider can discharge the employer's legal obligations.

But Altour continues to provide wage statements and payments to its employees. Thus, the 6AC alleges that "ADP contracted with Altour to provide *services*...including the calculation of Plaintiff's hours for the benefit of plaintiff...," AA-72, ¶185. These services included "payroll calculation, records maintenance, legal advice and a host of related services to ALTOUR for the benefit of ALTOUR and its employees in the general area of employee wages and benefits." AA-72, ¶187. While the 6AC alleges Altour relied on ADP to do appropriate, accurate calculations, AA-72, ¶185, the 6AC repeatedly alleges that *Altour and* ADP provided plaintiff "paychecks and earning statements" AA-66, ¶ 149, and each "confusingly" "elected" applicable payroll periods, *id.*, ¶150. Under such allegations, ADP did not perform in place of Altour.

Moreover, ADP did not render independent and entirely self-reliant performance. The 6AC alleges that "Plaintiff's time cards" "contained facts requiring" compensation she did not receive, AA-66, ¶ 148, thus underscoring that ADP, like any other third-party payroll service provider, performs "a largely ministerial task," of calculating wages using information supplied by the employers and employees. *Futrell*, 190 Cal.App.4th at 1432 (describing work of payroll service providers). That makes ADP unlike a promisor in a creditor beneficiary scenario—who renders complete, substitute performance.

The court of appeal relied upon two cases, *Soderberg v. McKinney* (1966) 44 Cal.App.4th 1760, 1771-1774 and *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 606-607. Neither supports expanding the law. In

Soderberg, Op.-23-24, a mortgage broker contracted for an appraisal that the broker used to solicit investors. The appraiser had exclusive control over the undertaking. In *Del E. Webb Corp.*, Op.-25, a supplier agreed to provide roofing materials to a subcontractor on a construction project. The supplier had exclusive control over the materials. In both cases, the contracts addressed discrete transactions controlled by the promissor to the third-party beneficiary.

Here, ADP does not discharge the employer's non-transferable obligation to pay legally compliant wages. Rather, ADP assists in fulfilling that obligation, as employees in a payroll department typically do for many employers.

Businesses enter into all sorts of contracts that fulfill obligations they have to those with whom they deal. None of this confers third party beneficiary status because such status does not extend to "persons who are only incidentally or remotely benefitted" by a contract. Op.-22.

Review is also warranted because the decision conflicts with (it erroneously dispenses with) the requirement that, in cases involving professional service contracts, a third party beneficiary relationship cannot exist unless the *principal purpose* of the promissee in hiring the promisor service provider was to benefit a third party instead of the promissee. This principal purpose requirement is necessary to distinguish agency relationships, where service providers have duties of loyalty to their employer-principals but not to third parties who benefit by the agent assisting the employer-principal. Here, as the 6AC concedes, Altour hired ADP to benefit itself—the employer who had the Labor Code duties that are the

basis of Plaintiff's alleged grievances.

The principal purpose requirement was aptly discussed in *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1268-69, which held that a fiduciary's contract with an attorney did not confer rights on estate beneficiaries even though those beneficiaries would obviously and naturally benefit from the attorney's work for the fiduciary. The absence of any contractual privity or principal purpose to benefit the beneficiaries foreclosed imposition of a duty (as necessary for the tort of negligence) running from the fiduciary's attorney to the beneficiaries. This same analysis applies to third-party beneficiary contract rights.

Goldberg noted that, in deciding whether to impose a duty running toward someone not in privity of contract with the professional services advisor-attorney,

> "[t]he predominant inquiry...is whether the principal purpose of the attorney's retention is to provide legal services for the benefit of the [non-contracting third party] plaintiff."

Id. at 1268. *Goldberg* then explained important reasons for the principal purpose inquiry and limitation on the recognition of third party rights.

> "Innumerable instances in modern practice are encountered in which services performed by an attorney will benefit others besides his client. *** In each of these instances the fortunes of third parties are affected by the performance of an attorney retained by a client not a member of the benefited group. The fact that third parties are thus benefited, or damaged, by the attorney's performance does not give rise to a duty by the attorney to such third parties, and hence cannot be the basis for a cause of action by the third parties for the attorney's negligence. In these cases the third parties are incidental beneficiaries, and "[a]n incidental benefit does not suffice to impose a duty upon the attorney."

Id. at 1268-1269.[11]

These concerns apply here. Some limit—like the principal purpose requirement—is needed to prevent transforming service providers into dual agents owing obligations in transactions to those opposite the businesses that hired them. Courts rarely impose on service providers duties extending to "a party with whom the[ir] client dealt at arm's length." *Sooy v. Peter* (1990) 220 Cal.App. 3d 1305, 1313. Civil Code §1559 addresses when contracts are properly classified as third-party beneficiary agreements: "A contract made expressly for the benefit of a third person...." Service contracts are not third party beneficiary contracts unless "an intent to make the obligation inure to the benefit of the third party...[was] clearly intended by the contracting parties." Op.-22, quoting in part *Schauer v. Mandarin Gems of California* (2005) 125 Cal.App.4th 949, 957-958.[12]

In a creditor beneficiary contract, "the main purpose of the promise is not to confer a benefit on the third party beneficiary, but to secure the discharge of his debt or performance of his duty to a third party." *Hartman Ranch*, 10 Cal.2d at

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[11] This Court has described the *Goldberg* decision as "entirely correct" but inapplicable to duties owed to a successor fiduciary—a distinction irrelevant here. *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 530.

[12] Goonewardene's counsel inadvertently provided at oral argument a good example of why taking on some payroll tasks for an employer does not equate to an intent to benefit the employees. Goonewardene's counsel argued that a courier entrusted by the employer to deliver checks to employees would be subject to a lawsuit on a third-party beneficiary theory by an employee for failure to deliver a check. An employer hires a payroll service provider to benefit itself so it doesn't have to perform all the required payroll tasks itself, just as it would benefit itself by hiring a courier to deliver checks.

245. Assistance with payroll is not like discharge of a debt. It involves rendition of a service, not substitution of the payroll provider's performance for that of the employer.

On the court of appeal's stated reasoning, any service provider that contracts with an employer to provide any service that can be argued to benefit an employee—a very broad array of services—is now subject to a direct lawsuit by an employee. This Court should review that ruling.

C. Review Is Warranted To Address The Holding That A Cause Of Action For Professional Negligence Has Been Adequately Pleaded

The decision below recognizes, also for the first time under California law, a tort claim for professional negligence against a payroll service provider. Review of that decision is warranted, not only because it rests on the court's flawed third-party beneficiary analysis as the basis for finding a duty supporting the negligence claim, Op.-41, but also because no duty should be imposed on payroll service providers regardless of whether they can be classified as promisors under third-party beneficiary contracts.

Thus, this Court's review of the third-party beneficiary issues will directly implicate whether a professional negligence cause of action lies here.[13]

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[13] The court of appeal's stated premise in finding the professional negligence cause of action was that it "confront[ed] the question not resolved" in this Court's decision in *Bily*, which the court described as "whether a financial services provider may be subject to a duty of care to a third party beneficiary of the contract between the provider and its client." Op.-40. But *Bily* identified its unresolved question (in footnote 16) very differently: "whether and under what

Additionally, if employees are third-party beneficiaries of contracts between their employers and payroll service providers, then the court of appeal decision conflicts with this Court's precedent holding that tort recovery is precluded for alleged breaches of duty that merely restate contractual obligations and is unavailable for claims for economic loss. That authority bars any professional negligence claim here.

This Court's decisions have stringently reinforced separation between contract law and tort law. This Court repeatedly has held that a party may not ordinarily recover in tort for breach of duties that restate contractual obligations. Breaching a contract does *not* create a tort claim, and "dual" contract-tort actions may be maintained *only* where the duty that gives rise to the tort claim is "*completely independent of the contract.*" *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552; *see also Aas*, 24 Cal.4th at 643 (negligence claim unavailable: "[a] person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations"); *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1181, 1184-85.

The professional negligence claim recognized by the court of appeal does not satisfy the requirement of *complete independence* from the third-party beneficiary contract claim the court recognized. To the contrary, exactly the same

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circumstances express third party beneficiaries of audit engagement contracts may recover as 'clients' under our holding." The court of appeal answered a very different question than that posed by *Bily* and got the answer wrong under well-established California law.

conduct by ADP would be the basis for each claim. Because ADP's alleged wrongful "professional" conduct is the alleged breach of the Altour-ADP contract, to which plaintiff is supposedly a third-party beneficiary, the professional negligence claim is ***not*** completely independent of the contractual duties. Rather, the alleged professional negligence and breach of contract are *coextensive and related.* If Plaintiff is the third-party beneficiary of the contract between her employer and ADP, then her sole remedy under established California law is an action on that contract and any tort claim is barred.

The court of appeal's recognition of a professional negligence cause of action also warrants review because it conflicts with California's economic loss rule. The economic loss rule "prevent[s] the law of contract and the law of tort from dissolving one into the other" by requiring that a party may only "recover in contract for purely economic loss due to disappointed expectations, unless [that party] can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988. Courts have consistently recognized that tort claims for economic losses are barred. *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 213; *United Guaranty Mortgage Indem. Co. v. Countrywide Fin. Corp.* (C.D. Cal. 2009) 660 F.Supp.2d 1163, 1183-85; *Neu v. Terminix Int'l, Inc.* (N.D. Cal. April 8, 2008) 2008 WL 962096.

This Court has recognized only a narrow exception to the economic loss rule. Plaintiff's 6AC does not meet it. To avoid the bar of the economic loss rule,

a plaintiff's tortious conduct allegations must meet two specific, narrow conditions: (1) alleged tortious conduct must be "separate from the breach itself" *and* (2) harm flowing from that conduct must "expose a plaintiff to liability for personal damages *independent of the plaintiff's economic loss*." *Robinson Helicopter*, 34 Cal.4th. at 991-93. The 6AC alleges only economic damages. The case law is replete with examples of courts applying the economic loss rule to bar recovery in cases, like this one, where plaintiff has brought tort claims relating to the performance of a professional services contract.[14]

Therefore, if Plaintiff is a third-party beneficiary of the Altour –ADP contract, she is barred from asserting a professional negligence claim under this Court's precedents.

But the court of appeal's recognition of a new tort of professional

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[14] *WeBoost Media S.R.L. v. LookSmart Ltd.* (N.D. Cal. June 12, 2014) 2014 WL 2621465 at *5-*6 (fraudulent concealment claims barred; they were "exactly what Plaintiff pled as to its breach of contract claims, but with the addition of fraudulent intent and concealment"); *JMP Sec. v. Altair Nanotechnologies, Inc.* (N.D. Cal. 2012) 880 F.Supp.2d 1029 (negligent misrepresentation claims relating to performance of services contract barred by economic loss rule: plaintiff "has taken the allegations underpinning a straightforward claim for breach of a commercial contract and recast them as torts" which "consist of nothing more than [defendant's] alleged failure to make good on its contractual promises"); *Audigier Brand Mgmt. v. Perez* (C.D. Cal. Nov. 5, 2012) 2012 WL 5470888; *see also, Legal Additions LLC v. Kowalski* (N.D. Cal. March 19, 2010) 2010 WL 1038444, at *9-*14, *on reconsideration*, (N.D. Cal. May 18, 2010) 2010 WL 1999894 (claimed misrepresentations during course of the parties' contract sound only in contract); *Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc.* (E.D. Cal. 2009) 629 F.Supp.2d 1135, 1145-46 (barring tort claim that defendant made false statements during performance of professional services contract); *Intelligraphics, Inc. v. Marvell Semiconductor, Inc.* (N.D. Cal. Feb. 10, 2009) 2009 WL 330259, *17-*18.

negligence against payroll service providers is review-worthy even if Plaintiff is *not* a third-party beneficiary of the Altour-ADP contract.

First, while a cause of action for professional negligence has been recognized by California courts with respect to certain professions subject to licensing, regulation and/or rules of professional conduct (for example, doctors and lawyers), no California case (until now) has recognized a claim applicable to payroll service providers.[15] Nor have we found any other jurisdiction recognizing such a tort claim.[16] Payroll service providers perform "largely a ministerial task,"

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[15] Thus, for example, California recognizes professional negligence against a home inspector because a statute imposes on inspectors an independent duty to those who hire them, in addition to any contract duties. *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1435.

[16] To the contrary, other jurisdictions have shown great reluctance to recognize new professional negligence claims. For example, with respect to a parallel "service provider" of more recent vintage that does not perform tasks that otherwise would be performed by the client, states have uniformly rejected claims of professional negligence against computer/software consultants, holding that they have no duty of care independent of their contracts. *See, e.g., Avazpour Networking Servs., Inc. v. Falconstor Software, Inc.* (E.D.N.Y. 2013) 937 F.Supp.2d 355, 364 ("While [computer software, hardware and related installation services] require specialized knowledge, New York state law does not recognize a cause of action for professional malpractice by computer consultants."); *Heidtman Steel Prods., Inc. v. Compuware Corp.* (N.D. Ohio Feb. 15, 2000) 2000 WL 621144, at 13-*14 (refusing to recognize cause of action for professional malpractice against computer consultants; courts have almost uniformly declined to treat them as professionals); *Ferris & Salter P.C. v. Thomson Reuters Corp.* (D. Minn. 2012) 889 F.Supp.2d 1149, 1151-53; *Chatlos Sys., Inc. v. Nat'l Cash Register Corp.* (D.N.J. 1979) 479 F.Supp. 738, 740. "Plaintiff equates the sale and servicing of computer systems with established theories of professional malpractice. Simply because an activity is technically complex and important to the business community does not mean that greater potential liability must attach. In the absence of precedential authority, the Court declines the invitation to create a new tort.").

Futrell, 190 Cal.App.4th at 1432. By contrast, professional negligence claims lie because "[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners...and failure to do so subjects them to liability for negligence." *Estate of Beach* (1975) 15 Cal.3d 623, 635. No statute, regulation or rule creates a duty owed by payroll service providers.

Second, under *Biakanja*, 49 Cal.2d at 650, whether the defendant will be liable to a third person not in privity is a matter of policy that involves balancing various factors, among which are "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." Correctly applying that test to plaintiff's 6AC allegations compels the conclusion that no tort duty is owed by ADP. [17]

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[17] Indeed, a finding here that no tort duty is owed by a payroll service provider is supported by the court of appeal's decision in *Giacometti v. Aulla*, LLC (2010)187 Cal.App.4th 1133, which it cited. There, the court affirmed the sustaining of a demurrer without leave to amend by applying the *Biankanja* factors to find that no professional negligence claim could be asserted by employees against accountants hired by their employer to create year-end earnings and tax documents, including the W-2 forms that were sent to the employees to prepare their tax filings. The parallels to this case are obvious. The Second Appellate District, Division Four (the court below here) conceded that it was foreseeable that incorrect information on W-2 forms could harm employees, but concluded "that alone does not create a

According to the court of appeal's analysis, ADP's work for Altour was intended to take "over the functions ordinarily assigned to an employer's internal payroll department" (Op.-16) and therefore assist Altour. ADP's work was not intended to "affect" plaintiff, since she was obliged to be paid by her employer as a matter of law whether ADP assisted or not. There was no foreseeability of harm to plaintiff by any action of ADP, since plaintiff has remedies against her employer for any improper wage payment, whatever the cause. There was no certainty that plaintiff would suffer any injury from any action by ADP for the same reasons. There is no closeness of connection between ADP's conduct and plaintiff's allegedly improper wages: Altour is responsible for paying proper wages, and employees have a direct right against Altour to obtain them. There is certainly no moral blame to attach to ADP's conduct, since its work was performed to assist Altour and was, at most, negligence.

Even if a third-party payroll service provider "takes over" an employer's payroll department, it is performing "largely a ministerial task, albeit a complex task in today's marketplace." Op.-15, *quoting Futrell*, 190 Cal.App.4th at 1432. The provider is, like the accountant in *Bily*, 3 Cal.4th at 376, dependent on data generated by others to perform its work. When service providers perform limited functions, under contract to one party, the *Biakanja* test disfavors imposition of a

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duty." The court concluded that the employer hired the accountants "not to benefit the employees but to fulfill a legal obligation to furnish pay information to the IRS." Similarly here, Altour hired ADP not to benefit the employees but to help fulfill its wage obligations under the Labor Code.

duty of care to third parties. *See, e.g., Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (escrow holder has no duty to third party when it performs limited functions of discharging instructions).

Finally, the policy of preventing future harm is not advanced, but impeded, by imposing a tort duty on payroll service providers. Prior to the court of appeal decision, allegations of improper wages were resolved in claims pursuant to the Labor Code by employees against their employers. If a wage problem resulted from the work of a payroll services provider on behalf of an employer, that issue was resolved pursuant to the contract between the employer and the payroll services provider. Moreover, a payroll service provider who makes mistakes could be expected to be replaced by one of its many competitors in the payroll service provider market. And shifting liability to payroll service providers for employer wage obligations can only discourage employer vigilance in discharging their legal obligations.

Recognizing a tort duty by a payroll service provider would only create a redundant, expensive, complicating and ultimately pointlessly circular claim that would benefit no one (except perhaps lawyers). Any plaintiff may (as here) allege fictionalized, unwritten payroll service contracts in order to multiply the number of defendants and get past a demurrer. Such claims will only increase costs, delay and uncertainty.

D. Review Is Warranted To Address The Holding That A Cause Of Action For Negligent Misrepresentation Has Been Adequately Pleaded

The court of appeal recognized, also for the first time, a cause of action for negligent misrepresentation against payroll service providers, based on allegations "that appellant's earnings statements, as provided by ADP, were inaccurate and omitted statutorily required information...." Op.-28.

If Plaintiff is a third-party beneficiary of the contract between her employer and ADP, then, as discussed in section C. above, she is barred from asserting a tort claim, including one for negligent misrepresentation, under this Court's precedent restricting tort remedies for contract breaches.

If, on the other hand, Plaintiff is *not* a third-party beneficiary of the Altour-ADP contract, then the negligent misrepresentation cause of action necessarily fails because the court of appeal relied on its third-party beneficiary classification to support the existence of the negligent misrepresentation tort. Op.-31-32.

In addition, while dubiously treating payroll service providers as "experts," subject to professional negligence liability, the court of appeal has erroneously failed to apply in its negligent misrepresentation analysis "limitation[s] applicable to claims against professionals such as auditors, attorneys, architects, engineers and title insurers, who generally provide reports or opinions to client on the basis of information supplied by the clients." Op.-30. Under the Restatement (Second) of Torts §552(2), which the court of appeal used as the framework for a negligent misrepresentation cause of action, the liability of third party service providers is

limited to "loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." Op.-30 fn.7. "This limitation [of negligent misrepresentation liability] extends liability 'only to those persons for whose benefit and guidance [the third party services are] supplied,' as 'distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.'" Op.-30-31 fn.7, quoting in part Restatement, *supra*, §552, comment h.

The decision here conflicts with this Court's *Bily* decision, 3 Cal.4th at 370, and the limits *Bily* places on negligence misrepresentation claims. Like the auditor in *Bily*, a payroll processor is a secondary actor that must act on the data supplied to it. A payroll service provider has no ability to prepare payroll unless it receives the data from which payroll and wage statements may be prepared. Plaintiff acknowledged this fact in her appellate court briefing. AOB-2. Whether data comes from employer or employee, the payroll preparation function involves use of data supplied by others, and it is "[l]argely a ministerial task...." Op.-15.

The court of appeal thought a difference here lies in the nature of ADP's role because "inaccuracy in the earnings statements are alleged to have arisen from ADP's own conduct, not from errors in the time cards provided to ADP." Op.-33. But the liability that was limited in *Bily* was auditor liability for *its* mistakes in

analyzing the financial data supplied to it and certifying that the financial statements were prepared according to accounting standards. In third-party service provider cases like *Bily*, the limits on tort liability exclude claims for what would otherwise be third-party provider liability for its own culpable conduct.

In addition, ADP assists in providing *the employer's* wage calculations and statements. If the employer can only be sued in contract for its calculations and statements, those who assist in preparing the calculations and statements on the employer's behalf should not face the potentially greater liabilities that come with the tort law.

IV. CONCLUSION

The court of appeal has not protected wage-earning workers, who have and retain recourse against those who hired them. Rather, the court has created litigation that burdens courts and litigants. Review is warranted.

Dated: December 14, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: _____

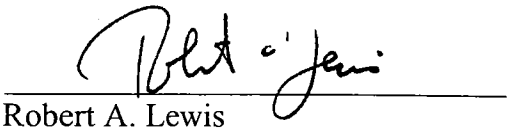
Robert A. Lewis
Attorneys for Defendants, Respondents and Petitioners ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

CERTIFICATION OF WORD COUNT

I certify that the attached brief is proportionately spaced, uses Microsoft Word 2010, is set in Times New Roman Font, has a typeface of 13 points or more, and contains 8,343 words.

Dated: December 14, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: 

Robert A. Lewis
Attorneys for Defendants, Respondents and Petitioners ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

CERTIFICATE OF SERVICE

I, Davace Chin, declare that I am a resident of the State of California, County of San Francisco. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On December 14, 2016, I caused the following document to be served:

PETITION FOR REVIEW

via Federal Express – following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date and addressed as follows:

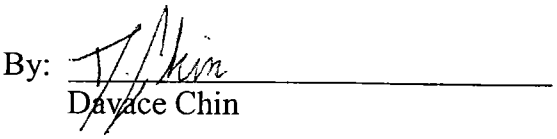
Glen Broemer
135 West 225th Street, Apt. F
Bronx, NY 10463

and via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

California Court of Appeal
Second Appellate District, Division 4
300 S. Spring Street
North Tower – Second Floor
Los Angeles, CA 90013

Honorable William Barry
Los Angeles County Superior Court
200 West Compton Boulevard
Compton, CA 90220

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on December 14, 2016, at San Francisco, California.

By: 
Davace Chin

Filed 11/4/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SHARMALEE GOONEWARDENE, Plaintiff and Appellant, v. ADP, LLC et al., Defendants and Respondents.	B267010 (Los Angeles County Super. Ct. No. TC026406)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed in part, reversed in part and remanded with directions.

Glen Broemer for Plaintiff and Appellants.

Morgan Lewis & Bockius, Robert A. Lewis, Thomas M. Peterson and Zachary Hill for Defendants and Respondents.

In the underlying action, appellant Sharmalene Goonewardene's fifth amended complaint asserted claims against respondents ADP, LLC, ADP Payroll Services, Inc. and AD Processing, LLC for wrongful termination, violations of the Labor Code, and related causes of action, including breach of contract, negligent misrepresentation, and negligence. The trial court sustained respondents' demurrers relating to the fifth amended complaint without leave to amend. Appellant contends the court abused its discretion in denying her leave to amend, arguing that her proposed sixth amended complaint states claims against respondents. We conclude that the proposed complaint states claims against respondents only for breach of contract, negligent misrepresentation, and negligence. We therefore affirm the trial court's ruling in part, reverse it in part, and remand with instructions to permit appellant to file a complaint against respondents asserting those claims.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In April 2012, appellant commenced the underlying action. Her initial complaints named as defendants a

California corporation and New York corporation bearing the same name -- Altour International Inc. -- and Alexandre Chemla, who was alleged to be the corporations' alter ego (collectively, Altour). The complaints asserted claims for wrongful termination, breach of contract, violations of the Labor Code, and related causes of action predicated on allegations that appellant was employed by Altour, which failed to compensate her in accordance with the Labor Code and wrongfully terminated her when she brought that misconduct to its attention.

In March 2015, appellant filed her fourth amended complaint (4AC), which, in addition to the claims previously alleged against Altour, included a single cause of action against respondent ADP, LLC, namely, a claim for unfair business practices under the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.). In connection with that claim, the complaint alleged that ADP, LLC, failed to provide appellant with adequate documentation and records regarding her compensation.

After ADP, LLC, demurred to the 4AC, appellant informed the trial court that she wished to assert additional claims against ADP, LLC. The trial court deferred ruling on the demurrer to permit appellant to submit a motion for leave to file the fifth amended complaint (5AC), which contained claims against all three respondents for wrongful termination, violations of the Labor Code and federal labor laws, breach of contract, unfair business practices, false advertising, negligence, and negligent misrepresentation.

The 5AC alleged that respondents entered into a contract with Altour to provide payroll services relating to Altour's employees. Several claims in the 5AC also effectively asserted or alleged that all respondents acted as appellant's employer.

In ruling on the pending demurrer to the 4AC and the motion for leave to file the 5AC, the trial court sustained the demurrer to all claims founded on the assumption that ADP, LLC was appellant's employer, co-employer, or joint employer. The court denied appellant leave to amend with respect to those claims, and ordered them dismissed with prejudice. The court otherwise permitted appellant to file the 5AC, on the condition that appellant assert only the remaining claims against respondents.

The 5AC nevertheless contained claims predicated on the assumption that ADP Payroll Services Processing, Inc. and AD Processing, LLC were appellant's employers. Respondents demurred to the 5AC, contending the employer-based claims were defective, and the remaining claims against respondents were untenable. The trial court sustained the demurrer without leave to amend, and asked respondents to prepare the final order reflecting its ruling.

While that order was pending, appellant submitted a motion for reconsideration and a proposed sixth amended complaint (6AC), which materially resembles the 5AC, as originally proposed. The 6AC contains claims similar to those in the original 5AC -- including the claims relying on the theory that respondents were appellant's employers --

with additional factual allegations. The motion for reconsideration requested leave to file the 6AC. On August 5, 2015, without expressly denying the motion for reconsideration, the trial court entered a final order sustaining respondents' demurrer to the 5AC without leave to amend, and a judgment of dismissal in favor of respondents. This appeal followed.

DISCUSSION

Appellant contends the trial court erred in sustaining respondents' demurrer to the 5AC without leave to amend. As explained below, we agree with the trial court that the majority of appellant's claims must be dismissed. However, we conclude the proposed 6AC adequately pleads claims for breach of contract, negligent misrepresentation, and negligence based on allegations that respondents performed payroll services for appellant's benefit in an inaccurate and negligent manner.

A. *Standard of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously

sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted (*Cantu*).) We do not assess the credibility of the allegations, as "'it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue.'" (*Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 375 quoting *Colm v. Francis* (1916) 30 Cal.App. 742, 752.)

"Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Cantu, supra,* 4 Cal.App.4th at p. 879, fn. 9.) To establish an abuse of discretion regarding the denial of leave to amend, "a plaintiff may propose new facts or theories to show the complaint can be amended to state a cause of action . . . ." (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460.)

That showing may be made by way of a motion for reconsideration. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1418.) Furthermore, the "showing need not be made in the trial court so long as it is made to the reviewing court." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386 (*Careau & Co.*).)

B. *Scope of Review*

At the outset, we examine the scope of our review of the ruling on the 5AC. The trial court's grant of

respondents' demurrer to the 5AC without leave to amend effectively barred appellant from filing the 6AC. Thus, our review examines whether the trial court erred in denying leave to amend the 5AC.

Although appellant's opening brief seeks a reversal of the trial court's rulings "as to every cause of action," she does not, in fact, attack the portion of those rulings sustaining the demurrers to the 5AC. Her brief contains no argument (supported by legal authority and citations to the record) aimed at showing any claim in the 5AC is tenable.[1] Rather, appellant's focus is on whether the trial court erred in denying leave to amend. In this regard, she argues that the trial court improperly declined to grant her motion for reconsideration, urges us to evaluate the allegations in the 6AC, and contends those allegations state causes of action. Accordingly, appellant has forfeited her challenge to the rulings on the 5AC, insofar as the court sustained demurrers to the claims in that complaint. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1504; see *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784.)

The remaining issue is whether appellant may challenge the denial of leave to amend on appeal, as the record reflects no oral request for leave to amend at the

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[1] Appellant's sole express citations to the 5AC occur in her reply brief, in the context of arguments intended to support the 6AC's allegations and to show that certain purported defects are curable by amendment.

hearing on the demurrer to the 5AC, and shows only that appellant sought to file the 6AC by means of a motion for reconsideration submitted while the final ruling on the demurrer to the 5AC was pending. In *Careau & Co.*, the plaintiffs in two consolidated actions filed first amended complaints, to which the defendants demurred. (*Careau & Co.*, *supra*, 222 Cal.App.3d at p. 1379.) After the trial court sustained the demurrers without leave to amend, the plaintiffs filed motions for reconsideration of the denial of leave to amend, accompanied by proposed second amended complaints. (*Id.* at pp. 1379-1380.) The trial court denied reconsideration, filed orders stating the grounds for the demurrers, and later entered judgments in favor of the defendants. (*Id.* at pp. 1380-1381.) Although the record reflected no request for leave to amend at the hearing on the demurrers, the appellate court concluded that in view of the reconsideration motions, it was appropriate to examine whether the second amended complaints stated causes of action. (*Id.* at pp. 1386-1387.)

We reach the same conclusion here and, accordingly, examine the 6AC in order to determine whether it states a claim against respondents (henceforth, collectively, ADP).[2]

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[2] ADP suggests that appellant may not challenge the denial of leave to amend because her motion for reconsideration was "premature." In view of the liberal policy permitting a party to show on appeal that an amended complaint states a cause of action, that contention fails.
(Fn. continued on next page.)

C. *Facts*[3]

The 6AC alleges the following facts: ADP is a payroll services provider. Since 2000, ADP's advertising and corporate statements have stated that it provides payroll-related services to employers and employees. ADP offers to "'serve as an extension of [an employer's] payroll department and [to] take over all [the employer's] payroll tasks." ADP holds itself out as possessing specialized knowledge regarding the calculation of wages under applicable wage laws and regulations, and states that it "can save employer[]s[']' money by calculating their payroll." ADP's Web site advertises its expertise in tracking employee work hours, determining wages, and preparing payrolls in accordance with applicable laws. According to the Web site,

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(*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 550 ["[A]buse of discretion in sustaining a demurrer without leave to amend is reviewable on appeal even in the absence of a request for leave to amend"].)

[3] We observe that the prolix and poorly organized 6AC ignores the rule that "the complaint must contain a statement of the facts in ordinary and concise language . . . ." (*M.G. Chamberlain & Co. v. Simpson* (1959) 173 Cal.App.2d 263, 267.) In such cases, we "disregard any defects in the pleading which do not affect the substantial rights of the parties," and assess whether "there are averments of ultimate facts sufficient to constitute a cause of action . . . ." (*Ibid.*)

ADP provides "'self-service tools'" allowing employees to view their attendance, vacation benefits, and time card approvals.

At some point, ADP entered into an unwritten contract with Altour, which provides travel-related services. Under that agreement, ADP calculated payrolls, maintained employee records, offered legal advice, and provided other wage-related services for the benefit of Altour and its employees. According to the 6AC, ADP entered into "a partnership or joint venture with Altour for the purpose of handling Altour's payroll and maintaining records and confidential information regarding Altour's employees." (Underscoring omitted.)

Appellant's ethnicity is Sinhalese and her nationality is Sri Lankan. In November 2005, appellant began her employment with Altour. She answered telephones, made airline, automobile, and hotel reservations, and issued electronic tickets and refunds. Because she worked on teams that provided services "24 hours a day 365 days of the year," she accrued overtime hours. Appellant "logged directly into an ADP system to track her earnings."

From 2005 to 2012, appellant did not receive the compensation due her, including overtime compensation, and she was denied meal and rest breaks required under Labor Code section 226.7. In addition, she was "treated differently as a result of her race, nationality[, and] ethnicity," as she was offered no promotions despite favorable work evaluations, and received less pay than a male counterpart.

Under ADP's agreement with Altour, the 6AC alleges, ADP maintained appellant's earnings records, added the hours on her time cards, calculated her earnings, and provided her with an earnings statement. ADP also was responsible for determining whether appellant was to receive, inter alia, overtime or double time (that is, overtime reflecting a doubled hourly rate of pay), in accordance with applicable labor laws. ADP alone was responsible for maintaining appellant's records relating to her compensation, adding the hours shown on her time cards, and applying the labor laws to determine her wages.

ADP failed to act with "even scant care" in calculating appellant's wages. (Underscoring omitted.) Her earnings statements provided by ADP never contained a breakdown of her regular hours, overtime hours or double overtime hours, and did not reflect data regarding meal and rest breaks. Although her time cards reflected facts requiring the payment of double time compensation, she received no such payment.[4] She was paid twice a month on a basis that was intentionally confusing and did not comply with the wage orders of the Industrial Welfare Commission (IWC).

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[4] In connection with appellant's reply brief, she filed a motion to augment the record with certain documents intended to show that ADP's pay calculations failed to reflect overtime compensation owed her. As we conclude that the 6AC sufficiently alleges that fact (see pts. E., F. & G. of the Discussion, *post*), we deny the motion.

According to the 6AC, Altour and ADP knew that appellant was not being paid in accordance with California law.

Appellant reasonably relied on the earnings statements provided to her. In 2010, she noticed disparities between her own bookkeeping and her hours worked, as shown on her paychecks. In January 2012, she was terminated. According to the 6AC, she was terminated "on a pretext and in retaliation for [her] efforts to be paid fairly and to receive those benefits to which she was legally entitled."

D. *Claims Based on Theory That ADP Was Appellant's Employer*

The 6AC asserts several claims predicated on the theory that ADP was appellant's employer. Specifically, they allege or suggest (1) that ADP was subject to certain duties to appellant imposed on employers under California and federal law, and (2) that ADP was empowered to terminate appellant's employment. The claims assert violations of the Labor Code and the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.), racial discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) and title VII of the Civil Rights Act of 1964 (title VII) (42 U.S.C. § 2000e et seq.), and wrongful termination in violation of public policy. As explained below, the claims fail for want of sufficient allegations establishing an employee-employer relationship between appellant and ADP.

1. *Labor Code Claims*

We begin with appellant's claims under the Labor Code. The 6AC asserts claims against ADP for failure to make timely wage payments (Lab. Code, §§ 201, 201.3, 201.5, 202, 203, 205.5; second cause of action), failure to pay overtime compensation (Lab. Code, § 1194; tenth cause of action), and failure to issue adequate earnings statements (Lab. Code, § 226; eleventh cause of action).

ADP's liability under the claims hinges on whether ADP employed appellant within the meaning of the term "employ" in the applicable IWC wage order which the 6AC alleges to be Wage Order No. 4-2001 or Wage Order No. 9-2001 (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1428-1429 (*Futrell*). Those wage orders define the term "[e]mploy" as "to engage, suffer, or permit to work." (Cal. Code Regs., tit. 8, § 11040(2)(E), 11090(2)(D).) That definition incorporates "three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 (*Martinez*).) Generally, "[t]he essence of the common law test of employment is in the 'control of details.' A number of factors may be considered in evaluating this control, including: (1) whether the worker is engaged in a distinct occupation or business; (2) whether, considering the kind of occupation and locality, the work is usually done under the alleged employer's direction or without supervision; (3) the

skill required; (4) whether the alleged employer or worker supplies the instrumentalities, tools, and place of work; (5) the length of time the services are to be performed; (6) the method of payment, whether by time or by job; (7) whether the work is part of the alleged employer's regular business; and (8) whether the parties believe they are creating an employer-employee relationship. [Citations.]" (*Futrell, supra*, 190 Cal.App.4th at p. 1434.)

The application of the IWC's definition of "employ" to Labor Code claims against a payroll services provider was examined in *Futrell*. There, the plaintiff initiated a class action against a television commercial production company and its hired payroll services provider, asserting claims under the Labor Code and the applicable IWC wage order for failure to make timely wage payments, issue adequate pay statements, and pay overtime compensation (Lab. Code, §§ 203, 226, 1194), together with claims under the FLSA for failure to pay overtime compensation (29 U.S.C. §§ 207, 216). (*Futrell, supra*, 190 Cal.App.4th at pp. 1424-1425.) When the payroll services provider sought summary adjudication on the claims, the evidence established that it collected timecards from the plaintiff, placed that information in a computer system to create the plaintiff's paychecks, and maintained records relating to the plaintiff's compensation. (*Id.* at p. 1427.) The trial court granted summary adjudication on the claims, concluding that the payroll services provider was not the plaintiff's employer. (*Id.* at pp. 1429-1430.)

Affirming the ruling, the appellate court held that for purposes of the Labor Code claims, no employment relationship existed under the three definitions incorporated in the IWC's definition of the term "employ[]." (*Futrell, supra*, 190 Cal.App.4th at pp. 1424-1425.) Regarding the first definition, the court determined that the payroll service provider's role in generating paychecks established no such relationship: "[W]e conclude that 'control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay, and not that a person or entity is physically involved in the preparation of an employee's paycheck. This is the only definition that makes sense. The task of preparing payroll, whether done by an internal division or department of an employer, or by an outside vendor of an employer, does not make [the preparer] an employer for purposes of liability for wages under the Labor Code wage statutes. The preparation of payroll is largely a ministerial task, albeit a complex task in today's marketplace. The employer, however, is the party who hires the employee and benefits from the employee's work, and thus it is the employer to whom liability should be affixed for any unpaid wages. The extension of personal liability to the agents of an employer is not reasonably derived from the language and purposes of the Labor Code wage statutes." (*Id.* at p. 1432.)

The court further determined that no employment relationship existed under the remaining definitions. Regarding the second definition, the court concluded that the

payroll service provider did not "suffer or permit" the plaintiff "to work," as there was no evidence it "had the power to either cause him to work or prevent him from working." (*Futrell, supra*, 190 Cal.App.4th at p. 1434.) Regarding the third definition, the court concluded that the record reflected no common law employment relationship because the payroll service provider lacked control over the circumstances of the plaintiff's work. (*Id.* at pp. 1433-1434.)

We find *Futrell* persuasive and apply its analysis in assessing the Labor Code claims in the 6AC. In an apparent effort to establish that ADP exercised a type of control over appellant required for an employment relationship, the 6AC alleges that ADP, by "partnering with or attaching itself to Altour's business and taking over a variety of employer functions, . . . essentially became [appellant's] employer at least in the area in which it maintain[ed] control . . . ." Because that allegation represents a legal conclusion, we disregard it, and examine whether the facts pleaded in 6AC establish an employment relationship. (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953.) As explained below, they do not.

The allegations in the 6AC demonstrate only that ADP took over the functions ordinarily assigned to an employer's internal payroll department, which is not properly regarded as an additional employer. (*Futrell, supra*, 190 Cal.app.4th at pp. 1424-1434.) Nothing in the 6AC suggests ADP had "the power or authority to negotiate and set [appellant's] rate of pay." (*Futrell, supra*, 190 Cal.app.4th at p. 1432.) On

the contrary, the 6AC asserts a claim for breach of contract *solely* against Altour (fourth cause of action), alleging that appellant entered into written and oral agreements with it, and that from 2005 to 2012, Altour repeatedly breached the agreements "by failing to pay [her] in accord with the *agreed upon* rate in . . . pay." (Italics added.) Furthermore, notwithstanding the wrongful termination claim asserted against ADP, the 6AC contains no factual allegations that ADP had the power to hire or fire appellant or control the circumstances of her work. Indeed, in the 6AC and on appeal, appellant asserts only that ADP exercised a specific type of control over the payment of her compensation. As discussed below, that purported control does not render ADP her employer.

Appellant contends ADP undertook an employment relationship with her because the 6AC assigns a broader range of responsibilities to ADP than attributed to the payroll service provider in *Futrell.* The 6AC alleges that under ADP's contract with Altour, ADP was exclusively responsible for determining how appellant's salary was to be calculated under applicable laws. Indeed, according to appellant's opening brief, Altour played no role in the calculation of her wages, aside from providing her time card data to ADP. The brief states that Altour "did *nothing more* than transmit time card information prepared by [appellant] to ADP, and by design ADP exercised complete control over the amount [appellant] was actually paid." (Italics added.) Relying on those allegations, appellant maintains that ADP's

responsibilities in applying the governing laws were not ministerial, arguing that ADP's exercise of judgment regarding those laws necessarily "'influenced' a key term of [her] employment, [namely], how much she was to receive in exchange for her labor."

Appellant's contention fails, as ADP's influence is not reasonably regarded as "'control over wages,'" for purposes of IWC's definition of the term "employ." That definition refers to "the power or authority to negotiate and set an employee's rate of pay," that is, the basic discretionary right to select the rate of pay from a range of potential values. (*Futrell, supra*, 190 Cal.App.4th at p. 1432.) The allegations of the 6AC fail to establish that ADP had such power. Rather, ADP's influence arose solely through Altour's duties under the Labor Code and the applicable wage orders, which specified how appellant's pay was permissibly calculated once she and Altour agreed upon her rate of pay. Because those duties identify the appropriate lawful "time and manner of paying wages" and "mandatory overtime pay" (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858, abrogated on another ground in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4), they are not discretionary, but mandatory (*Redwood Coast Watersheds Alliance v. State Bd. Of Forestry & Fire Protection* (1999) 70 Cal.App.4th 962, 970 [discretionary acts are those regarding which there is no hard and fast rule as to the course of conduct that one must or must not take]). Accordingly, in undertaking to determine appellant's compensation in compliance with those duties, ADP acquired

no basic discretionary right to set appellant's rate of pay. Rather, ADP's alleged deviations from the lawful determination of appellant's compensation constituted errors by ADP, not the exercise of a right. ADP's conduct under its agreement is thus properly characterized as ministerial. (*Id.* at p. 970 ["A duty is ministerial when it is the doing of a thing unqualifiedly required"].) In sum, the 6AC fails to allege the employment relationship required for the Labor Code claims.

2. *FLSA Claims*

The 6AC asserts two claims against ADP under the FLSA for failure to pay overtime compensation (sixth and twelfth causes of action; 29 U.S.C. §§ 207, 216). ADP's liability under those claims hinges on whether there is an employer-employee relationship under the so-called "'economic reality test.'" (*Futrell, supra*, 190 Cal.App.4th at p. 1435.) That test, though distinct from the IWC's definition of the term "'employ'" (*Martinez, supra*, 49 Cal.4th at pp. 59-60), ordinarily involves the consideration of similar factors (*Futrell, supra*, 190 Cal.App.4th at p. 1435). In applying the test, courts examine "'the economic reality of a work relationship,'" with due attention to "'"whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."'" (*Guerrero v. Superior Court* (2013)

213 Cal.App.4th 912, 928-929, quoting *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1469-1470, disapproved on another ground in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 539.)

The FLSA claims fail in view of *Futrell*. In affirming summary adjudication of the plaintiff's FLSA claims relating to overtime compensation, the court reasoned that under the economic reality test, the payroll services provider was not the plaintiff's employer, as it merely prepared his paychecks and maintained certain compensation records. (*Futrell, supra*, 190 Cal.App.4th at pp. 1435-1436.) That rationale applies here. As explained above (see pt. C.1. of the Discussion, *ante*), according to the facts alleged in the 6AC, ADP acted as Altour's payroll department; it exercised no material control over appellant's rate of pay, terms of employment, or circumstances of work. Accordingly, under the "economic reality" test, the 6AC fails to establish an employment relationship sufficient to support the FLSA claims.

3. *Discrimination Claims*

The 6AC contains claims against ADP for discrimination under FEHA (eighth cause of action) and title VII (ninth cause of action). As these claims assert discrimination relating to appellant's employment, ADP is liable for the alleged discrimination only if it employed her. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 123 [FEHA prohibits only employers from engaging in

discrimination]; *Murray v. Principal Financial Group, Inc.* (9th Cir. 2010) 613 F.3d 943, 944 [plaintiffs may assert title VII discrimination claim against entity only if they are its employees].) Although courts have applied a variety of specific tests to determine the existence of an employment relationship under the two statutory schemes, "[t]he common and prevailing principle espoused in all of the tests" directs attention to "the 'totality of circumstances' that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties." (*Vernon, supra*, 116 Cal.App.4th at p. 124.) As explained above, the circumstances surrounding appellant's work did not demonstrate an employment relationship between her and ADP. Accordingly, the 6AC states no discrimination claims against ADP.

4. *Claim for Wrongful Termination in Violation of Public Policy*

The 6AC's claim charging ADP with appellant's wrongful termination in violation of public policy (fifth cause of action) fails for similar reasons. The claim alleges that when appellant sought the compensation due her, Altour and ADP discharged her, in contravention of public policy incorporated in the Labor Code favoring timely payment of all wages owed. That claim, however, "can only be asserted against *an employer*." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900.) In sum, the claims in

the 6AC predicated on the theory that ADP employed appellant are fatally defective, as the allegations establish no employee-employer relationship between appellant and ADP.

E. *Breach of Contract Claim Predicated on Third Party Beneficiary Theory*

The 6AC contains a breach of contract claim against ADP predicated on the theory that appellant and other Altour employees were third party beneficiaries of the agreement between Altour and ADP (eighteenth cause of action). For the reasons discussed below, we conclude the claim is adequately pleaded.

Civil Code section 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him [or her] at any time before the parties thereto rescind it." Here, "'"[e]xpressly,' . . . means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'" [Citations.] "[A]n intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties.'" [Citation.]" (*Schauer v. Mandarin Gems of Cal.* (2005) 125 Cal.App.4th 949, 957-958.) For that reason, the statute "'excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it. [Citations.]'" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1137 (*California Emergency Physicians Medical Group*).)

A third party may have enforceable rights under a contract as either a creditor beneficiary or a donee beneficiary. (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1199.) "A person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee." (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400.) In contrast, "[a] person is a donee beneficiary only if the promisee's contractual intent is either to make a gift to him or to confer on him a right against the promisor." (*Id.* at pp. 400-401.)

Because "[t]hird party beneficiary status is a matter of contract interpretation" (*California Emergency Physicians Medical Group, supra,* 111 Cal.App.4th at p. 1138), a party alleging a claim for breach of contract based on that status "must plead a contract which was made expressly for his benefit and one in which it clearly appears that he was a beneficiary" (*Luis v. Orcutt Town Water Co.* (1962) 204 Cal.App.2d 433, 441.) The term "'express,'" as applied here, is subject to two pertinent qualifications.

First, to be an express third party beneficiary, a person "'need not be named or identified individually,'" as it is sufficient that the contract shows he or she "'is a member of a class of persons for whose benefit it was made.'" (*Spinks v. Equity Residential Brairwood Apartments* (2009) 171 Cal.App.4th 1004, 1023.) In *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1763 (*Soderberg*), a mortgage broker

engaged in the business of arranging investments in mortgage loans. In order to secure the plaintiff's investment in a specific loan, the broker arranged for an appraiser to provide the plaintiff with an appraisal of the net value of the pertinent property. (*Ibid.*) After the investment failed, the plaintiff learned that the property's true net value was far less than as appraised, and sued the broker and appraiser for breach of contract. (*Id.* at pp. 1763-1764.) When the trial court ruled that the complaint stated no claim against the appraiser, the plaintiff sought leave to amend to assert a third party beneficiary theory based on an alleged contract between the broker and the appraiser for the preparation of appraisal reports to be given to potential investors. (*Id.* at p. 1772.) The trial court denied that request, concluding that the alleged contract did not expressly designate the plaintiff as a third party beneficiary. (*Id.* at p. 1773.) Reversing, the appellate court concluded that the proposed amendment asserted a tenable third party beneficiary theory, even though the alleged contract did not specifically identify the plaintiff as a beneficiary. (*Id.* at pp. 1172-1174.)

Second, the status of a third party beneficiary does not require a written contract. In *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 606 (*Del E. Webb Corp.*), a general contractor asserted a claim for breach of contract against a construction materials supplier, contending it was the third party beneficiary of an oral contract between one of its subcontractors and the supplier. The general contractor's complaint alleged that "'in order to

provide [the subcontractor] with the roofing materials and other materials needed in the performance of the subcontract, and for the benefit of [the general contractor], [the supplier] agreed to supply any and all roofing materials and other materials necessary for the subcontract between [the general contractor] and [the subcontractor].'" (*Id.* at pp. 606-607.) The appellate court held that a demurrer to the claim had been improperly sustained, concluding that the allegation was sufficient to plead the general contractor's status as a third party creditor beneficiary of the oral contract. (*Id.* at p. 607.)

Under the principles discussed above, when a business enters into a contract with a service provider clearly aimed at aiding the business in discharging its duty to supply information or benefits to certain individuals, those individuals constitute third party creditor beneficiaries of the contract between the business and service provider. (See *Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at p. 400; *Soderberg*, *supra*, 44 Cal.App.4th at pp. 1771-1774; *Del E. Webb Corp.*, *supra*, 123 Cal.App.3d at pp. 606-607.) The 6AC articulates that theory. The gravamen of its allegations is that Altour engaged ADP to discharge Altour's wage-related legal duties to its employees, that is, Altour's obligations under the Labor Code and applicable wage orders to accurately calculate employees' wages, fully distribute those wages in a timely manner, and provide employees with accurate earnings statements.

The 6AC alleges that ADP, in its advertising, "expressly offers to partner with employers for their mutual benefit and for the benefit of employees." The 6AC further alleges that "Altour and ADP entered into an unwritten contract whereby ADP provided payroll calculation, records maintenance, legal advice and a host of related services to Altour for the benefit of Altour and its employees in the general area of employee wages and benefits." In this regard, the 6AC contains specific allegations that ADP provided services directly to Altour employees. The 6AC alleges that under the agreement, ADP added the hours on appellant's time cards, calculated her earnings, and provided her with earnings statements in connection with her compensation. Additionally, ADP allegedly was responsible for determining whether appellant was to receive overtime or double time in accordance with applicable labor laws. The 6AC thus alleges that Altour employees such as appellant are, at a minimum, third party creditor beneficiaries of the unwritten agreement.[5]

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[5] In addition to alleging that ADP's advertising "expressly offers to partner with employers for their mutual benefit and for the benefit of employees," the 6AC alleges that ADP provided services to employees not legally required, for example, a mechanism allowing employees to access information and track their earnings. Accordingly, the 6AC arguably also alleges that Altour employees are donee beneficiaries of the agreement.

The 6AC further alleges that that ADP breached its contractual obligations relating to Altour's wage-related duties to appellant, and that appellant suffered damages as a result. As elaborated below (see pt. F of the Discussion, *post*), the 6AC asserts that appellant was denied full compensation because ADP repeatedly failed to determine that she was owed overtime or double time pay, and otherwise provided inadequate earnings statements. Regarding these matters, the 6AC expressly attributes some of that alleged misconduct to ADP's own errors and misapplication of the applicable wage orders, rather than to mistakes in earnings data transmitted by Altour. Appellant has thus stated a breach of contract claim against ADP as a third party creditor beneficiary.[6]

Relying on *Martinez*, *supra*, 49 Cal.4th 35, ADP contends that as a matter of law, Altour employees cannot be third party beneficiaries of ADP's contract with Altour for the provision of payroll processing services. In our view, that broad proposition finds no support in *Martinez*. There, a farmer entered into contracts with merchants for the sale of his produce. (*Id.* at pp. 42-44.) Under the contracts, the farmer received advance payments that were to be retired

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[6] In so concluding, we make no findings regarding the accuracy of the allegations in the 6AC. As explained above (see pt. A. of the Discussion, *ante*), for purposes of our review, we must accept the factual allegations in the 6AC as true.

from the revenues generated when his produce was delivered and sold; in addition, the farmer was entitled to a share of those revenues. (*Ibid.*) During the harvest season, the farmer failed to pay his field workers, who asserted Labor Code claims against the farmer and the merchants, contending all were their employers. (*Id.* at p. 48.) After the merchants secured summary judgment on the claims against them, our Supreme Court affirmed that ruling, determining that none of the merchants employed the workers. (*Id.* at pp. 68-77.) The court also rejected a contention that the workers were third party beneficiaries of one of the contracts, concluding that the terms of the contract manifestly placed sole responsibility for discharging wage-related duties on the farmer. (*Id.* at p. 77.) In contrast, according to the 6AC, under the unwritten contract between Altour and ADP, ADP undertook to discharge Altour's wage-related duties -- including the calculation of employees' wages and the provision of earnings statements -- to Altour's employees for their benefit. In sum, the 6AC states a breach of contract claim against ADP predicated on a third party beneficiary theory.

F. *Negligent Misrepresentation Claim*

The 6AC contains a negligent misrepresentation claim predicated on allegations that appellant's earnings statements, as provided by ADP, were inaccurate and omitted statutorily required information (thirteenth cause of

action). As explained below, we conclude that claim is sufficiently pleaded.

For a claim of negligent misrepresentation, "[a] plaintiff must prove the following in order to recover[:] '[M]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage. [Citation.]' [Citation.]" (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 983, quoting *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.)

The tort requires a ""positive assertion."" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 854 (*OCM Principal Opportunities Fund*), quoting *Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297-298.) The tort thus encompasses "'[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' [citation], and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' [citations]." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174 (*Small*).) Furthermore, "when the defendant purports to convey the 'whole truth' about a subject, "'misleading half-truths"' regarding that subject may constitute positive assertions for the purpose of negligent

misrepresentation." (*OCM Principal Opportunities Fund, supra*, 157 Cal.App.4th at p. 854, quoting *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1081.)

The tort is also subject to a limitation applicable to claims against professionals such as auditors, attorneys, architects, engineers, and title insurers, who generally provide reports or opinions to clients on the basis of information supplied by the clients. (*OCM Principal Opportunities Fund, supra*, 157 Cal.App.4th at p. 856.) In *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408-415 (*Bily*), our Supreme Court held that an auditor who plays a "secondary" role in the preparation of a financial report for a client -- that is, who relies entirely on information provided by its client, and is subject to the client's "primary control of the financial reporting process" -- is liable only to a limited class of third parties for negligent representations contained in the financial report, viz., the class delimited in section 552, subdivision (2), of the Restatement Second of Torts.[7]

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[7] Restatement Second of Torts section 552(2) provides that the liability of such parties is limited to the "loss suffered [¶] (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and [¶] (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." This limitation extends liability "only to those persons for whose benefit and guidance it is
(Fn. continued on next page.)

(*Bily, supra,* 3 Cal.4th at p. 400.) Under *Bily*, negligent misrepresentation claims against such professionals may be asserted only by "specifically intended beneficiaries of the report who are substantially likely to receive the misinformation." (*Murphy v. BDO Seidman* (2003) 113 Cal.App.4th 687, 694 (*Murphy*).)

Here, the 6AC alleges that ADP made positive untrue assertions regarding appellant's wages. Under the agreement between Altour and ADP, ADP was responsible for "adding the hours on [appellant's] time cards," calculating her wages, and preparing her earnings statements. Nevertheless, according to the 6AC, from 2005 to 2012, appellant did not receive her full compensation. The 6AC attributes that misconduct directly to ADP, alleging that "[w]hile [appellant's] time cards often contained facts requiring the payment of double time, [she] did not receive a single double time payment . . . ." The 6AC further asserts that the earnings statements ADP prepared failed to comply with Labor Code section 226, contained no breakdown of appellant's regular hours, overtime hours, or

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supplied," as "distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it." (Rest.2d Torts, § 552, com. h, pp. 132-133.)

double time hours, and reflected an accounting method of her time that was intentionally confusing.[8]

Under these allegations, the wage statements provided by ADP, based on data supplied by Altour employees, contained positive inaccurate assertions that ADP could not reasonably have believed to be true. According to the 6AC, ADP miscalculated appellant's total wages by omitting double time payments owed her. In view of those alleged miscalculations, her earnings statements inaccurately stated her total wages, or alternatively, constituted misleading half-truths, as the earnings statements purported to convey the whole truth regarding her total wages. As ADP allegedly

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[8] Subdivision (a) of Labor Code section 226 provides in pertinent part: "Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee . . . , (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee . . . , (8) the name and address of the legal entity that is the employer . . . , and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."

had the time card data necessary to calculate appellant's overtime, those misrepresentations were not reasonable.

Furthermore, under the allegations in the 6AC, ADP falls outside the limitation of liability applicable to professional providers of financial reports who play only a "secondary" role in the preparation of the reports. According to the 6AC, under ADP's contract with Altour, ADP was charged with calculating employee wages in accordance with applicable laws. The inaccuracies in the earnings statements are alleged to have arisen from ADP's own conduct, not from errors in the time cards provided to ADP. Because ADP itself was allegedly responsible for the inaccuracies, its role regarding them was not merely "'secondary.'" (*Nutmeg Securities, Ltd. v. McGladrey & Pullen* (2001) 92 Cal.App.4th 1435, 1441-1442 [complaint stated negligent misrepresentation claim against auditor in view of allegations that auditor directly participated in creation of misleading financial statements]; see *OCM Principal Opportunities Fund, supra*, 157 Cal.App.4th at p. 857 [bank was subject to liability for negligent misrepresentation for offering memorandum prepared for another party because bank possessed reliable information establishing the falsity of financial forecasts contained in offering memorandum].) Furthermore, for the reasons discussed above (see pt. E. of the Discussion, *ante*), appellant was among the "specifically intended beneficiaries" of ADP's earnings statements "substantially likely to receive the

misinformation." (*Murphy, supra,* 113 Cal.App.4th at p. 694.)

In an apparent effort to establish that appellant's earnings statements contained no inaccuracies supporting a negligent misrepresentation claim, ADP directs our attention to appellant's opening brief, which states: "ADP received only a record of [appellant's] hours per day, generated by [appellant], and used that information to provide [appellant] with a paycheck and earnings statement on a semi-monthly basis. ADP had no ability whatsoever to determine whether [appellant] took or missed a meal or rest break, and calculated [appellant's] pay on the assumption that [appellant] never missed a break." However, immediately following that passage, appellant's brief states: "While [appellant's] time cards often showed that she worked in excess of 12 hours on various workdays and in excess of eight hours on the seventh consecutive day in a workweek, ADP *never* paid [appellant] double time for such work, in violation of IWC [Wage Order No.] 9-2001(3)(A)(1)(b) and Labor Code section 510."[9] That portion

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[9] We observe that under the allegations in the 6AC, ADP undertook to calculate earnings in accordance with applicable laws. IWC Wage Order No. 9-2001(3)(A)(1) states in pertinent part: "Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than: [¶] . . . [¶] (b) Double the employee's regular rate of pay for all hours worked in excess

(Fn. continued on next page.)

of the opening brief sets forth the alleged inaccuracies in ADP's calculation of appellant's compensation that resulted in the underpayment of her wages. As explained above, because the earnings statements provided to appellant by ADP purported to -- but allegedly did not -- represent her accurately calculated compensation due, the 6AC states a claim for negligent misrepresentation.

ADP also suggests that the 6AC contains no allegations establishing justifiable reliance. We disagree. Generally, to plead a claim for negligent misrepresentation, a plaintiff must allege with sufficient particularity that he or she actually relied on the misrepresentation, as well as that such reliance was justifiable. (*Daniel v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1168.) Reliance may be predicated on a theory of forebearance, that is, "the decision not to exercise a right or power . . . ." (*Small, supra,* 30 Cal.4th at p. 174.) Under such a theory, the plaintiff

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of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek." IWC Wage Order No. 4-2001, upon which the 6AC also relies, contains an identical provision (see IWC Wage Order No. 4-2001(3)(A)(1)(b)).

Labor Code section 510 states: "Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee."

should ordinarily allege "actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." (*Id.* at p. 184.) Additionally, to allege justifiable reliance under any theory, the plaintiff "must set 'forth facts to show that his or her actual reliance on the representations was justifiable, so that the cause of the damage was the defendant's wrong and not the plaintiff's fault.'" (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1066, quoting 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 732, p. 153.) Reliance is justifiable when the "'circumstances were such to make it reasonable for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. [Citation.]" (*OCM Principal Opportunities Fund, supra,* 157 Cal.App.4th at p. 864, italics omitted, quoting *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332.)

Aside from alleging in general terms that appellant reasonably relied on the earnings statements, the 6AC asserts that after appellant began her employment in 2005, she was paid twice monthly, and received earnings statements from ADP. In 2010, she noticed disparities between her own records and her hours worked as reflected on her paychecks. She then made her own wage calculations to verify deficiencies in the paychecks. After she sought

unpaid compensation, she was terminated. Those allegations adequately plead actual reliance predicated on forebearance, as they show that appellant decided to claim additional compensation only after she became aware of inaccuracies in the earnings statements. Until then, the "'circumstances were such to make it reasonable for [appellant] to accept [ADP's] statements without an independent inquiry or investigation'" (*OCM Principal Opportunities Fund, supra*, 157 Cal.App.4th at p. 864, italics omitted). Thus, in view of the relative complexity of the wage calculation, appellant's reliance on ADP's earnings statements until 2010 was justifiable. In sum, the 6AC states a claim for negligent misrepresentation against ADP.

G. *Professional Negligence Claim*

The 6AC contains a claim for professional negligence against ADP (fourteenth cause of action) predicated on allegations that ADP, as a payroll services provider, breached a duty of care owed to appellant, resulting in the underpayment of her compensation. Generally, "there are four essential elements of a professional negligence claim: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 319,

quoting *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) Here, the key question regarding appellant's claim is whether the 6AC adequately alleges that ADP owed a duty of care to her.

Privity of contract is required for the existence of such a duty of care, absent special circumstances. (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137 (*Giacometti*).) *Biakanja v. Irving* (1958) 49 Cal.2d 647 is the leading case regarding those circumstances. There, a notary public prepared a will for a client, but negligently failed to have it properly attested. (*Id.* at p. 648.) Following the client's death, the primary beneficiary under the will asserted a claim for negligence against the notary. (*Ibid.*) After the beneficiary secured a judgment in his favor, our Supreme Court examined whether the notary owed a duty of care to the beneficiary, notwithstanding the absence of a contract between them. (*Id.* at pp. 648-651.) The court stated: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Id.* at p. 650.) Under that test, the court concluded the beneficiary was entitled to recover against the notary, despite the absence of privity. (*Id.* at p. 651.)

In *Bily*, the Supreme Court concluded that under the multi-factor test set forth in *Biajanka*, auditors playing a "secondary" role in preparing financial reports for a client owe no duty of care to third parties not in privity of contract with the auditors. (*Bily*, *supra*, 3 Cal.4th at pp. 402, 396-407.) As the court explained, auditors acting in that role are ultimately dependent upon the information supplied by their client, and have little or no control over to whom the client distributes their reports. (*Id.* at pp. 400.) The court determined that three considerations conclusively weighed against the imposition of a duty of care: (1) that recognition of such a duty exposed an auditor to "potential liability far out of proportion to its fault," in view of its "secondary 'watchdog' role"; (2) that the "generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) permit[ted] the effective use of contract rather than tort liability to control and adjust the relevant risks"; and (3) that the imposition of tort liability was likely to increase the costs and reduce the availability of auditing. (*Id.* at p. 398.) Regarding item (3), the court concluded that the imposition of liability would not yield greater accuracy "without disadvantage," in view of the "labor-intensive nature of auditing," which creates a report through "a complex process involving discretion and judgment on the part of the auditor at every stage." (*Id.* at pp. 400, 404.) In view of that complexity, the court noted, few audits are immune from criticism. (*Id.* at p. 400.)

Greater vulnerability to litigation was therefore likely to reduce the availability of auditing services. (*Id.* at p. 404.)

The court thus held that "an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." (*Bily, supra*, 3 Cal.4th at p. 406.) Nonetheless, in a footnote accompanying that holding, the court stated: "In theory, there is an additional class of persons who may be the practical and legal equivalent of 'clients.' It is possible the audit engagement contract might expressly identify a particular third party or parties so as to make them express third party beneficiaries of the contract. Third party beneficiaries may under appropriate circumstances possess the rights of parties to the contract. [Citations.]" (*Id.* at p. 406, fn. 16.) Noting the case presented no third party beneficiary issue, the court declined to further address the issue. (*Ibid.*)

Here, we confront the question not resolved in *Bily*, namely, whether a financial services provider may be subject to a duty of care to a third party beneficiary of the contract between the provider and its client. In our view, under the facts alleged in the 6AC, ADP owed a duty of care to appellant, for purposes of a professional negligence claim. As explained below, that conclusion relies on three considerations: (1) that under the 6AC's allegations, appellant is a creditor beneficiary to the contract between

Altour and ADP with respect to wage-related duties that Altour owed appellant; (2) that the *Biajanka* factors weigh in favor of recognizing a duty of care; and (3) that the considerations identified in *Bily* as precluding the imposition of such a duty on auditors are not present here.

In view of appellant's status as a creditor beneficiary, she is reasonably regarded as "the practical and legal equivalent" of a party to the contract between Altour and ADP. (*Bily*, *supra*, 3 Cal.4th at p. 406, fn. 16.) Generally, creditor beneficiaries may enforce the terms of the contract made for their benefit to the extent the promissee is authorized to do so. (*Mercury Casualty Co. v. Maloney* (2003) 113 Cal.App.4th 799, 802 ["A person who is not a party to a contract may nonetheless have certain rights thereunder, and may sue to enforce those rights, where the contract is made expressly for her benefit"]; *Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 296 ["While the contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party [beneficiary]"].) Accordingly, to the extent the contract obligated ADP to discharge Althour's pre-existing wage-related duties to appellant, she is authorized to enforce that contractual obligation against ADP.

Furthermore, the *Biajanka* factors weigh in favor of recognizing a duty of care. The contract between Altour and ADP was intended to affect all Altour employees, including appellant, and harm to them was manifestly foreseeable

upon ADP's alleged failure to determine their wages in accordance with applicable laws. For the reasons discussed above (see pt. E. of the Discussion, *ante*), appellant's injuries were certain and closely connected with ADP's alleged conduct, as ADP was engaged both to calculate her earnings and to provide earnings statements reflecting the wages due; her failure to received the compensation owed her was attributable to ADP's own alleged errors. That underpayment must be regarded as significant, as "'it has long been recognized that . . . because of the economic position of the average worker . . . , it is essential to public welfare that he receive his pay when it is due." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326, quoting, *In re Trombley* (1948) 31 Cal.2d 801, 809-810.) Furthermore, recognizing a duty of care encourages accurate payment of wages. (See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 110-112 [law firm engaged by clients to prepare an opinion letter to be shown to bank in order to secure loan from bank owed a duty of care to bank].)

The considerations set forth in *Bily* barring the imposition of a duty of care on auditors are not present here. According to the allegations in the 6AC, ADP did not occupy a "secondary 'watchdog' role" (*Bily, supra*, 3 Cal.4th at p. 398), but was contractually obligated to carry out Altour's wage-related legal duties to its employees; the key misconduct asserted against ADP stemmed from its own alleged errors. Furthermore, the imposition of a duty of care

on ADP does not render it vulnerable to potentially open-ended liability, as the class of potential plaintiffs is limited to Altour's employees. That class also differs markedly from the potential plaintiffs in *Bily* in terms of financial sophistication. Finally, payroll preparation, though complex, "is largely a ministerial task" carried out by an employer's internal payroll department or an outside provider. (*Futrell, supra*, 190 Cal.App.4th at p. 1432.) For the reasons discussed above (see pt. D.1. of the Discussion, *ante*), the tasks undertaken by ADP do not involve the complex exercises of discretion akin to those involved in audits, which are thus frequently open to criticism. Accordingly, the rationale in *Bily* linking the imposition of liability to a significant reduction in the availability of auditing services is inapplicable here.

The decisions upon which ADP relies are distinguishable. In *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 570-571, a partnership retained an accountant to provide accounting services, including a calculation of each partner's profit allocation in the partnership. In making that determination, the accountant employed the method of calculation specified by the partnership. (*Id.* at p. 580.) On the basis of that calculation, the partnership bought out the interest of one of the partners, who later sued the accountant for professional negligence. (*Id.* at pp. 571-572.) Affirming summary judgment on that claim in favor of the accountant, the appellate court concluded that the claim failed for want of a

duty of care running from the accountant to the partner. (*Id.* at pp. 580-581.) The court determined that no duty arose under *Biajanka* because the accountant had merely carried out -- accurately -- the calculation specified by the partnership. (*Id.* at pp. 581-583.) In addition, the court determined that the contract between the partnership and the accountant established no accountant-client relationship with the aggrieved partner. (*Id.* at pp. 582-585.) In contrast, under the 6AC's allegations, appellant was a third party creditor beneficiary of Altour's contract with ADP, and it was ADP's alleged errors that resulted in appellant's insufficient compensation.[10]

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[10] Those allegations also distinguish *Giacometti*, which ADP does not discuss. There, a restaurant hired an accounting firm to prepare year-end documents required by the Internal Revenue Service regarding employee earnings. (*Giacometti*, *supra*, 187 Cal.App.4th at pp. 1135, 1139.) The firm prepared employee W-2 forms on the basis of information provided by the restaurant concerning wages and tips. (*Id.* at p. 1139.) Several employees asserted a claim for professional negligence against the firm, alleging that their W-2 forms overstated their income because the information provided by the restaurant to the firm included tips not received by them. (*Id.* at pp. 1135-1136.) After the trial court sustained a demurrer to their complaint without leave to amend, this court affirmed, determining that under *Biajanka* and *Bily*, it alleged no duty of care. (*Id.* at pp. 1137-1141.) In so concluding, we observed that the restaurant's intention in hiring the firm was to discharge its
(Fn. continued on next page.)

In *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 339, an attorney engaged by a corporation misadvised its officers regarding the legality of a sale of shares. The shares were purchased by the plaintiffs, who later learned that the sale was unlawful, and asserted a claim for professional negligence against the attorney. (*Id.* at pp. 340-341.) After a demurrer to the claim was sustained without leave to amend, our Supreme Court concluded that the attorney owed no duty of care to the plaintiffs, as they had no relationship to the corporation or the attorney other than as purchasers of the shares. (*Id.* at pp. 343-345.) That is not true here, as Altour hired ADP to assist in discharging its legal duties to employees such as appellant. In sum, the 6AC states a claim for professional negligence against ADP.

H. *False Advertising Claim*

We turn to the 6AC's claim against ADP under the False Advertising Law (FAL) (Bus. & Prof. Code, § 17500 et seq.; seventeenth cause of action). As explained below, that

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legal obligation to the Internal Revenue Service, not to benefit the employees, and that the firm had no "primary role in the harm," as it had been hired merely to prepare documents based on the information provided to it by the restaurant. (*Id.* at pp. 1139-1141.) As explained above, the 6AC alleges that Altour relied on ADP to do the appropriate calculations based on data ultimately supplied to ADP by employees like appellant.

claim fails for want of allegations establishing her standing to assert it.

The FAL makes it unlawful for any person or corporation, acting with the intent to perform a service or "induce the public to enter into any obligation relating" to that service, to disseminate a statement by means of advertising that is "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." (Bus. & Prof. Code, § 17500.) Claims under the FAL, like claims under the UCL, are subject to the requirements imposed under Proposition 64, which the voters of California approved in November 2004. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Proposition 64 amended the FAL and the UCL to limit standing to assert claims to any "'person who has suffered injury in fact and has lost money or property as a result of" a violation of the FAL or the UCL. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321 (*Kwikset*).)

"To satisfy these requirements at the pleading stage a plaintiff must allege facts showing that he or she suffered an economic injury *caused by* the alleged violation. [Citation.] Because 'reliance is the causal mechanism of fraud' [citation] this requires pleading facts showing actual reliance, that is, that the plaintiff suffered economic injury as a result of his or her reliance on the truth and accuracy of the defendant's representations. [Citation.]" (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 228.)

Here, the 6AC contains no allegations establishing the requisite reliance. The 6AC alleges that ADP disseminated many untrue or misleading statements by means of advertising and the internet. According to the 6AC, those statements related to ADP's provision of payroll tools and services to employers and employees to ensure compliance with applicable laws, and ADP's partnership or joint venture with the Altour defendants for the purpose of handling its payroll, maintaining its records, and safeguarding confidential employee information. The 6AC describes ADP's purportedly misleading statements, but does not allege that appellant actually saw them. Although the 6AC asserts that appellant "logged directly into an ADP system to track her earnings," it contains no allegations that she was exposed to the misleading statements through that system (or in some other way) or that they affected her conduct. In the absence of such allegations, the 6AC's assertion that the misrepresentations caused injury to appellant are insufficient to plead reliance.

Appellant contends those allegations are inessential to her claim. Pointing to *Kwikset*, she argues that the phrase "as a result of," as employed in the FAL and the UCL, requires a showing of a causal connection *or* reliance on the alleged misrepresentation. She asserts that "of these options, she can show a causal connection, rather than reliance."

In our view, appellant's contention reflects a misapprehension of *Kwikset*. There, in the context of

examining a false advertising claim under the UCL, our Supreme Court discussed the meaning of the phrase "'as a result of,'" for purposes of the FAL and the UCL. (*Kwikset, supra*, 51 Cal.4th at pp. 326-327.) After noting that in *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 855 (*Hall*), the appellate court construed that phrase to require "'a showing of a causal connection or reliance on the alleged misrepresentation,'" the court in *Kwikset* set forth the "controlling" analysis, which it attributed to its prior decision in *In re Tobacco Cases II Cases* (2009) 46 Cal.4th 298 (*Tobacco Cases II*). (*Kwikset, supra*, at p. 326.)

The court in *Kwikset* stated: "Recognizing that 'reliance is the causal mechanism of fraud' [citation] we held that a plaintiff 'proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions.' [citation.]" (*Kwikset, supra*, 51 Cal.4th at p. 326, quoting *Tobacco Cases II Cases, supra*, 46 Cal.4th at pp. 306, 326.) In a footnote, the court explained: "'Reliance' as used in the ordinary fraud context has always been understood to mean reliance on a statement for its truth and accuracy. [Citation.] . . . It follows that a UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made. [Citation.] . . ." (*Kwikset, supra*, 51 Cal.4th at p. 327, fn. 10.)

The court pointed with approval to *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1363-1364 (*Durell*), which involved a UCL class action against a hospital predicated on a fraudulent business practice. (*Kwikset, supra*, 51 Cal.4th at p. 327.) The class plaintiff's complaint alleged that the hospital's Web site and services agreement contained misrepresentations regarding the fees charged uninsured patients for medical services. (*Durell, supra,* 183 Cal.App.4th at pp. 1361-1362.) Although the complaint alleged that the plaintiff had suffered damages as a "'proximate result'" of the misrepresentations, it contained no allegation that he ever saw them or relied on them. (*Id.* at p. 1363.) After a demurrer to the complaint was sustained without leave to amend, the appellate court affirmed. (*Id.* at pp. 1362-1364.) In so concluding, the court rejected a contention based on *Hall* that a simple allegation of causation sufficed for a UCL claim, stating that *Tobacco Cases II* required an allegation of reliance. (*Id.* at pp. 1363-1364.)

In view of *Kwikset* and *Durell,* the 6AC lacks the requisite allegations of reliance, and appellant otherwise acknowledges that she cannot cure that deficiency. Accordingly, the 6AC states no claim under the FAL.

I. *UCL Claims*

The 6AC contains two claims under the UCL against ADP, one of which (fifteenth cause of action) relies on the misconduct alleged in connection with the claims for

negligent misrepresentation, negligence, and violations of the FAL, and the other of which (sixteenth cause of action) relies on the misconduct alleged in connection with the claims based on the theory that ADP was appellant's employer. Generally, the UCL defines "unfair competition" broadly to include "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Under the UCL, damages cannot be recovered, and plaintiffs are generally limited to restitution and injunctive relief. (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 610.) As explained below, the allegations in the 6AC fail to adequately state these claims.

First, we conclude that the 6AC alleges no unlawful or unfair business practice. Generally, "[b]y proscribing 'any unlawful' business practice, '[the UCL] "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [¶] . . . [¶] However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair *or* fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

Liability for unlawful and unfair practices is subject to a restriction traceable to *Cel-Tech*, which involved UCL claims relating to the marketing of consumer goods and services. The court concluded that for purposes of the type of

UCL claim presented to it, the public policy necessary to establish an unfair practice must be closely tied to a statute. (*Cel-Tech, supra,* 20 Cal.4th at p. 187.) Following *Cel-Tech,* at least one appellate court has concluded that in any UCL action, the public policy underlying an alleged unfair practice "must be 'tethered' to specific constitutional, statutory, or regulatory provisions." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854.)

In *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, the appellate court applied that limitation to a UCL claim arising in circumstances closely resembling those presented here. There, a franchisor of convenience stores imposed a contractual obligation on franchisees to obtain payroll services from the franchisor. (*Id.* at pp. 1180-1181.) A franchisee's employee asserted a UCL class action against the franchisor, alleging that its payroll system did not fully compensate franchisee employees for their work. (*Aleksick, supra,* 205 Cal.App.4th at pp. 1180-1181.) When the franchisor secured summary judgment on the claim, the appellate court affirmed, concluding that because the franchisor was not the class members' employer, the UCL claim failed for want of a cognizable unlawful or unfair practice under the Labor Code, as the franchisor was not subject to the wage-related duties imposed on employers under that code. (*Aleksick, supra,* at pp. 1185-1193.)

Likewise, the 6AC fails to allege an unlawful or unfair practice. As explained above (see pt. D. of the Discussion, *ante*), the labor laws and wage orders identified in the 6AC

are not applicable to ADP. For that reason, the alleged misconduct by ADP does not violate the public policy underlying them.

Additionally, we conclude that the 6AC alleges no fraudulent practice entitling appellant to relief under the UCL. To the extent the UCL claims rely on the alleged false advertising attributed to ADP in connection with the FAL claim, the UCL claims fail for the same reason as the FAL claim, namely, insufficient allegations of reliance. Furthermore, to the extent the UCL claims rely on the misrepresentations in appellant's earnings statements, as alleged in connection with the negligent misrepresentation claim, the claims fail for want of any allegation that ADP derived a benefit from the misrepresentations supporting a restitutionary recovery.

In *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1444, abrogated on another ground in *Martinez, supra*, 49 Cal.4th at page 50, footnote 12, three corporations hired an accountant to perform bookkeeping and payroll work for them. When the corporations failed to pay wages owed their employees, litigation ensued in which two employees and other parties asserted a UCL claim against the corporation's owners and the accountant. (*Bradstreet, supra,* 161 Cal.App.4th at pp. 1444-1448.) When the accountant secured a judgment in her favor on the claim, the appellate court affirmed, concluding there was no basis for a restitutionary recovery against her because she derived no benefit from the unpaid wages. (*Id.* at pp. 1458-1463.) That

rationale applies here, as the 6AC contains no allegation that ADP derived a benefit from appellant's unpaid wages for which she may seek restitution. In sum, the 6AC states no UCL claim.

J. *Aiding and Abetting Claim*

Appellant contends she is entitled to assert a claim for aiding and abetting against ADP. Although her opening brief discusses that theory of joint liability and the 6AC's caption page refers to an aiding and abetting claim as the nineteenth (and final) cause of action, the 6AC contains no such claim. Appellant's reply brief states that the omission was inadvertent, and directs our attention to the aiding and abetting claim in the 5AC. As explained below, appellant has failed to show she can state a tenable aiding and abetting claim.

Generally, "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects [in a complaint] remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) To carry that burden, appellant "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [she] must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.]

Allegations must be factual and specific, not vague or conclusionary. [Citation.]" (*Id.* at p. 43.)

Aiding and abetting, though similar to conspiracy, involves distinct elements.[11] (*American Master Lease, supra*, 225 Cal.App.4th at p. 1475.) "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. [Citations.]" (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) Unlike a conspirator, an aider and abettor need not be capable of the target tort. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144, fn. 2.) To plead aiding and abetting

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[11] "Civil conspiracy is 'a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] . . . .' [Citation.] 'By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1473-1474 (*American Master Lease*), quoting *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

by a defendant, the plaintiff must allege that the defendant had actual knowledge of the "specific primary wrong" being committed, and gave substantial assistance to the wrongful conduct. (*Id.* at pp. 1145, 1146-1147; *Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343-344 (*Nasrawi*).)

As alleged in the 5AC, the aiding and abetting claim is the final cause of action, and incorporates all the previous factual allegations. The claim's material additional allegations are (1) that Altour and ADP "formed a common plan to pay Altour employees unfairly," (2) that they knew that appellant was not being paid in accordance with California law, (3) that "ADP knowingly aided and abetted Altour in committing the wrongful termination," (4) that ADP gave substantial assistance or encouragement to Altour, and (5) that ADP's conduct was a substantial factor in causing harm to appellant.

Appellant has failed to show that she can state an aiding and abetting claim against ADP with respect to unpaid wages. Generally, aiding and abetting requires the commission of an underlying tort. (*Nasrawi, supra*, 231 Cal.App.4th at p. 344, fn. 7.) Although her briefs refer to two potential torts -- namely, conversion and "theft" -- the 5AC and 6AC assert no such claims against Altour, and she offers no argument (with citation to legal authority) that the misconduct alleged in them constitutes those torts.

Appellant also has forfeited any contention that she can state an aiding and abetting claim against ADP with

respect to the alleged wrongful termination, as her briefs contain no argument in support of that claim. We also point out that an aider and abettor must "'provide assistance that was a substantial factor in causing the harm suffered'" (*American Master Lease*, *supra*, 225 Cal.App.4th at p. 1476, quoting *Neilson v. Union Bank of California, N.A.* (C.D. Cal. 2003) 290 F.Supp.2d 1101, 1135). Thus, "'causation is an essential element of an aiding and abetting claim . . . .'" (*American Master Lease*, *supra,* at p. 1476, quoting *Neilson*, *supra*, at p. 1135.) However, as neither the 5AC nor the 6AC contains specific allegations describing how ADP assisted in or encouraged her termination, appellant has failed to plead the requisite causation. (*Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 97 [aiding and abetting claim fails for want of specific factual allegations showing substantial assistance or encouragement].) In sum, appellant had failed to demonstrate a tenable aiding and abetting claim.

DISPOSITION

The judgment is reversed to the extent the trial court denied appellant leave to file an amended complaint asserting claims against respondents limited to breach of contract, negligent misrepresentation, and negligence, as set forth in our opinion (see pts. E., F. & G. of the Discussion, *ante*). The judgment is affirmed in all other respects. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

Filed 11/29/16 mod

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SHARMALEE GOONEWARDENE, Plaintiff and Appellant, v. ADP, LLC et al., Defendants and Respondents.	B267010 (Los Angeles County Super. Ct. No. TC026406) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the opinion filed herein on November 4, 2016 be modified as follows:

On page 24, line 20, change "1172-1174" to "1772-1774"

On page 25, lines 12 through 17, delete:

> Under the principles discussed above, when a business enters into a contract with a service provider clearly aimed at aiding the business in

discharging its duty to supply information or benefits to certain individuals, those individuals constitute third party creditor beneficiaries of the contract between the business and service provider.

And substitute:

Under the principles discussed above, when an employer enters into a contract with a service provider by which the provider is to take over the employer's payroll tasks, including the preparation of the payrolls themselves, the employees constitute third party creditor beneficiaries of the contract between the employer and service provider.

On page 45, line 14, following the sentence ending with the word "ADP," insert the following footnote:

In a petition for rehearing, ADP asserts that the economic loss rule bars the professional negligence claim. As that contention was not raised prior to the filing of our opinion, it has been forfeited. (*Alameda County Management Employees, Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10.)

Moreover, we would reject the contention were we to consider it. The economic loss rule provides that "'"[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.'" . . . "The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." (*Robinson Helicopter Co. v.*

Dana Corp. (2004) 34 Cal.4th 979, 988.) Under the rule, a plaintiff is permitted to recover purely economic losses due to negligence in the performance of a contract if a "'special relationship'" exists (*Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1215), which may arise when the plaintiff, though not in privity to the contract, is a third party beneficiary of the contract and the *Biakanja* factors are appropriately present (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803-807; see *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 605). Under the allegations in the 6AC, that is the case here.

The petition for rehearing by respondents is denied. The modification does not change the judgment.

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*EPSTEIN, P. J., WILLHITE, J. MANELLA, J.,